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IN THE
Supreme Court of the United States

ALASKA CIVIL LIBERTIES UNION,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requires the state to demonstrate that campaign finance regulations address some "real problem," an issue now pending in *Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963)?

2. Whether the campaign finance regulations approved by the Alaska Supreme Court, including the limits on candidates' expenditures, a $500 annual limit on individual contributions, a prohibition of certain non-resident contributions, and the restrictions on political party coordinated expenditures, violate the First Amendment?

PARTIES TO THE PROCEEDING

The caption of the case contains the name of all parties.

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STATE OF ALASKA,

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On Petition for Writ of Certiorari to the Supreme Court of Alaska

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PETITION FOR WRIT OF CERTIORARI

The Alaska Civil Liberties Union respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alaska (Pet. App. 1a-81a) is reported as *State of Alaska v. Alaska Civil Liberties Union*, No. S-8778, 1999 WL 219443 (Alaska Apr. 16, 1999). The opinion of the Superior Court of Alaska (Pet. App. 82a-87a) is not reported.

JURISDICTION

On April 16, 1999, the Supreme Court of the State of Alaska entered a judgment holding that certain campaign finance regulations were constitutional and did not violate

the First Amendment. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, as applied to the states through the Fourteenth Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const.: Amend. I.

The statute at issue is Alaska's Campaign Finance Reform Act of 1996. The full text of the relevant provisions is set out in the Appendix.

STATEMENT

In 1996, the Alaska Legislature enacted the Campaign Finance Reform Act, 1996 Alaska Sess. Laws, ch. 48 (the "Act").[1] The Act took effect on January 1, 1997.

The Act lowers the amount an individual may contribute to a candidate or group (political action committee) from $1,000 per election to $500 per year. Alaska Stat. Ann. § 15.13.070(b)(1) (Lexis 1998). As there are both primary and general elections in each election cycle in Alaska, the new individual contribution limit is only 25% of the combined $2,000 primary and general election

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[1] The Act was the legislative response to a proposed citizens' initiative to "reform" Alaska's campaign finance laws that was to appear on the November 1996 general election ballot. The Alaska Attorney General determined that the Act was "substantially similar" to the citizens' initiative, thereby removing the initiative from the ballot.

contribution limit approved in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

The Act restricts the ability of residents of sister states from making contributions to a candidate for elective office in Alaska. Candidates may not accept any contribution from an individual non-resident once an aggregate non-resident contribution threshold is reached. Alaska Stat. Ann. § 15.13.072(a)(2) (Lexis 1998). Non-resident individual contributions to a group or a political party are also restricted. Alaska Stat. Ann. § 15.13.072(f) (Lexis 1998). Non-resident groups are foreclosed from making any contributions. Alaska Stat. Ann. § 15.13.072 (a)(3) (Lexis 1998). The Act also prohibits out-of-district contributions from a registered lobbyist. Alaska Stat. Ann. § 15.13.074(g) (Lexis 1998).

The Act sets limits on the amounts that a recognized political party may contribute to a candidate. Alaska Stat. Ann. § 15.13.070(d) (Lexis 1998). It also imposes severe restrictions on contributions made to a political party. Alaska Stat. Ann. § 15.13.070(b)(2) (Lexis 1998); Alaska Stat. Ann. § 15.13.070(c)(2) (Lexis 1998). The state oversight agency, the Alaska Public Offices Commission ("APOC"), has ruled that any qualified contribution to a political party is deemed to be for the express advocacy of candidates. APOC Informal Advisory Op. (June 3, 1997), Ex. 3 to Pl.'s Reply to State's Opp'n to Summ. J. Mot., *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998). This rule applies even in years when no election is pending. As a result, unlike federal law, contributions intended for generic "party building," party administration, or "get-out-the-vote" activities are subject to the Alaska Act's source and amount restrictions.

Under the Act, candidates may not accept contributions until the year in which the election is to be held. The Act

extends Alaska's pre-existing restriction on fundraising by incumbent legislators during the legislative session to include non-incumbent challengers. The Act also limits post-election fundraising.[2] Alaska Stat. Ann. § 15.13.074 (c)(4) (1996) (amended by § 5, ch. 74, SLA 1998). Candidates can thus accept contributions only during a very short time period.

The Act also imposes expenditure limitations in the form of a "spend-down" provision that limits the amount of unused campaign funds that a candidate may carry-forward to future campaigns. Alaska Stat. Ann. § 15.13.-116(a)(8) (1996) (amended by § 8, ch. 74, SLA 1998).[3] Another provision precludes candidates from using campaign contributions to make contributions to other candidates. Alaska Stat. Ann. § 15.13.112(b)(7) (Lexis 1998).

The Alaska Civil Liberties Union ("AkCLU"), a non-partisan, membership organization which is the state affiliate of the national American Civil Liberties Union, filed suit in Alaska Superior Court on July 3, 1997, seeking a declaration that these provisions of the 1996 Act violated rights to free speech and association protected under the state and federal constitutions. The decisions of both the Alaska Superior Court and the Alaska Supreme Court rest entirely on federal constitutional grounds.

Following cross-motions for summary judgment, on August 10, 1998, Judge Wolverton of the Superior Court

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[2] This provision was amended in 1998 and extends the period during which contributions can be received following an election from 45 to 60 days or December 31 of the year of the election, whichever is earlier. *See* Alaska Stat. Ann. § 15.13.074(c)(4) (Lexis 1998).

[3] This provision was renumbered as the result of a 1998 amendment. *See* Alaska Stat. Ann. § 15.13.116(a)(7) (Lexis 1998).

ruled that the 1996 Act, in its entirety, violated the First Amendment. The court stated: "it is well settled that without a showing of actual harm, the overriding First Amendment concerns must prevail." App. 84a. The trial court noted that the state itself recognized that the impetus for the restrictions came from popular "concerns that large contributions distorted the political process and made elected officials captive to the pressures of raising campaign funds." *Id.* at 85a (*quoting* State's Mem. in Opp'n to Mot. for Prelim. Inj. at 7). The court concluded that while possibly "present[ing] a very real issue, [this concern] does not represent a 'real harm' of actual or apparent corruption." *Id.* Rather, restrictions based on such concerns reflect an attempt to " 'level the playing field' amongst wealthy and less wealthy citizens." *Id.* at 86a. The court concluded: "To the extent this argument is made or suggested, it is rejected, just as it was rejected in *Buckley*." *Id.*

The Superior Court also rejected the Act's limit on individual contributions to candidates: "[G]iven the fact that the 1996 Act limits contributions to $500 total, versus the $2,000 permitted under *Buckley* in 1976, the only conclusion to be drawn is that the limit set by the 1996 act amounts to a 'difference in kind.' " *Id.* at 85a-86a.

In its unanimous decision of April 16, 1999, the Alaska Supreme Court held constitutional all but two provisions of the Act.[4] In its opinion, the Alaska court recited this

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[4] The court rejected the non-election year fundraising ban on the ground that contributors' inability to express support and affiliation with a candidate for such a lengthy time period interfered significantly with the right of association. App. 69a. The court also struck down the prohibition against fundraising during the legislative session. The court reasoned that the ban was not narrowly tailored, as the asserted rationale, *i.e.*, avoiding corruption of incumbents, did not apply to non-incumbent challengers. *Id.* at 72a-73a.

Court's "real harm" standard, *id.* at 16a-18a, but then allowed the state to rely on evidence primarily consisting of newspaper accounts, anonymous studies, and affidavits relating the impressions of third parties. *See, e.g., id.* at 5a-6a, 43a-44a, 47a-50a.

The Alaska court expressly approved the state's interest in "leveling the playing field" not only to uphold the Act's restrictions on corporations, labor unions and other business entities, but also to justify the limits imposed on non-residents. *Id.* at 39a-40a. Invoking *Buckley*'s holding that *large* contributions can be regulated to address the "appearance of corruption," the court upheld: (1) total bans on contributions by certain non-residents, *id.* at 40a-41a, and contributions by lobbyists to out-of-district candidates, *id.* at 46a; (2) a reduction in the individual contribution limit from $1,000 per election to $500 annually, *id.* at 57a-58a; and (3) post-election fundraising more than 45 days after an election, *id.* at 71a. The court upheld expenditure limits on the amount of unused campaign funds a candidate may carry forward to a future campaign, *id.* at 75a, and a complete ban on inter-candidate transfers of campaign funds, *id.* at 78a, to prevent avoidance of the Act's contribution limits.

REASONS FOR GRANTING THE PETITION

The Alaska Supreme Court upheld a series of campaign contribution and expenditure limits that is far more restrictive than any previously approved by an appellate court. Standing alone, many of the restrictions are more burdensome than similar provisions rejected by this Court and by the federal courts of appeals. Taken together, the regulatory scheme now in place in Alaska is unparalleled in the extent of its judicially sanctioned restrictions on campaign finance activities.

I. THE ALASKA SUPREME COURT DECISION RAISES THE SAME ISSUE NOW BEFORE THE COURT IN *NIXON v. SHRINK MISSOURI GOVERNMENT PAC* (NO. 98-963).

This Court has decided to review the judgment of the United States Court of Appeals for the Eighth Circuit that Missouri's limits on campaign contributions violate the First Amendment because the state "failed to come forward with evidence" that campaign contributions cause any "real problem." *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 522 (8th Cir. 1998), *cert. granted sub nom. Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963). The Alaska Supreme Court decision presents the same fundamental issue as the Missouri case: whether a state must demonstrate that limits on individual contributions to candidates and to political parties, limits on a political party's contributions to its candidates, and limits on candidates' expenditures address some "real problem."

To regulate speech, the state must prove that the harms that it recites are "real, not merely conjectural" and that, at a minimum, the regulation "will in fact alleviate these harms in a direct and material way." *See United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) ("*NTEU*") (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion of Kennedy, J.) (internal quotation marks omitted)). The Court has required proof that regulations of commercial speech, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), of government employees' speech, *NTEU*, 513 U.S. at 475, of cable television programming, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997), and of independent expenditures by political parties, *Colorado Republican Federal Campaign Committee*

v. FEC, 518 U.S. 604, 618 (opinion of Breyer, J.), 647 (opinion of Thomas, J.) (1996), address a "real harm."

Indeed, as the Court held recently in a commercial speech case, the "requirement" that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical." *Greater New Orleans Broadcasting Association, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999) (internal quotation marks and citations omitted). Absent some evidence of real harm, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* (internal quotation marks and citations omitted). Similarly, absent evidence of some real harm, Alaska "could with ease restrict [political] speech in the service of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression."

The Alaska Superior Court correctly held that the state could not regulate campaign financing "without a showing of actual harm" and that, under *Colorado Republican*, Alaska "must demonstrate the existence or appearance of corruption." App. 84a-85a. The state, however, pointed only to "concerns that large contributions distorted the political process and made elected officials captive to the pressures of raising campaign funds." *Id.* at 85a. In rejecting this attempted justification, the Superior Court recognized that "a generalized fear of potential for corruption and undue influence" is not enough to override the First Amendment. *Id.* at 84a.

The state Supreme Court, however, merely recited this Court's "real harm" standard, *id.* at 16a-18a, and then upheld a $500 limit on campaign contributions and other

contribution limits, as well as restrictions on candidates' expenditures, on the basis of mere speculation and conjecture. Alaska did not present any evidence of actual corruption attributable to campaign contributions in excess of $500. In fact, it made no showing that there were even any hints of *quid pro quo* exchanges of votes for contributions from any individual, business organization, labor union, or political action committee.

The state's "evidence" about the "appearance of corruption," while voluminous, consisted of little more than newspaper articles and editorials, "studies" quoting anonymous sources,[5] and self-serving affidavits submitted by proponents of a campaign finance "reform" initiative. *See, e.g., id.* at 5a-7a, 35a, 43a-45a, 47a-48a, 76a. Although the state presented affidavits of a few public officials, these affidavits also fell far short of any showing that campaign contributions or expenditures in Alaska cause any real harm.[6] *Id.* at 6a, 35a-36a, 44a, 49a-50a, 76a.

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[5] The Josephson Institute Study supplied by the state and relied on by the Alaska Supreme Court includes the anonymous and unsworn "opinions" of lobbyists, legislators, and state public officials. *See* "The State of Legislative Ethics in the State of Alaska," April 2, 1990, Appellant's Excerpt of the Record 1, 11, *State of Alaska v. AkCLU*, 1999 WL 219443 (Alaska Apr. 16, 1999) (No. S-8778).

[6] Much of the remaining evidence was raw or summarized data of corporate, lobbyist, and non-resident contribution patterns. *See, e.g.*, L. Makinson, "Open Secrets," 1986, 1987, Def.'s Opp'n to Summ. J. Mot., Exs. E, F, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998); Stern Aff., *id.*, Ex. A. This data, standing alone, does not establish corruption or the appearance of corruption. *See Russell v. Burris*, 146 F.3d 563, 569 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998); *Vannatta v. Keisling*, 931 P.2d 770, 785-87 (Or. 1997). The state's "best" evidence of corruption or the appearance of corruption was the affidavit of a former legislator, David Finkelstein, who stated that "[a]lthough I cannot recall the exact subject of [some] minor bills, I do recall that large contributions had an effect on my vote on some of them." Finkelstein Aff., ¶ 7, Appellant's Excerpt of the Record at 61-62, *State of*

It is hardly surprising that the state has no evidence that campaign contributions in Alaska cause any "real problem" of corruption or even of the appearance of corruption. *Shrink Missouri Government PAC v. Adams*, 161 F.3d at 522. The principal purposes of the 1996 Act were to shorten the length of campaigns, to curtail fundraising and the amount of political expenditures, and to restrict the influence of certain "undesirable" entities.[7] Such purposes, however, are not constitutionally sufficient to justify campaign contribution and expenditure limits. *See FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*") ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). The Alaska Supreme Court, nonetheless, repeatedly relied on these, and other constitutionally inadequate purposes to sustain the Act. *See, e.g.*, App. 5a-7a, 24a, 43a-44a ("special influence" over or access to politicians by "special interests"); *id.* at 3a, 5a-6a, 47a-50a, 67a (general public dissatisfaction with politicians); *id.* at 23a-24a,

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Alaska v. AkCLU, No. S-8778, 1999 WL 219443 (Alaska Apr. 16, 1999); *see* App. 49a. Mr. Finkelstein, however, was a leading proponent of the campaign finance initiative that led to the enactment of the 1996 Act and his statement "is conclusory and self-serving, given [his] vested interest in having the courts sustain the law" that he supported. *Shrink v. Missouri Government PAC v. Adams*, 161 F.3d at 522.

[7] Three of the six legislative findings set forth in the 1996 Act focus on escalating campaign costs and the allegedly excessive lengths of campaigns. Campaign Finance Reform Act, Alaska Stat. Ann., Temporary and Special Acts, §§ 1(a)(1), (2), (4), ch. 48 (Lexis 1996). Two findings mention corruption, but they are restricted to allegations about the possibility of undue influence by groups pejoratively labeled "organized special interests" and about the possible conversion of campaign funds to personal use. *See id.*, §§ 1(a)(3), (5). The AkCLU did not challenge the state's power to prohibit conversion of campaign funds to personal use.

39a-40a ("disproportionate influence"); *id* at 40a ("distortion" of the political process). As the Chairman of the Senate Judiciary Committee observed, the campaign finance initiative, which prompted the legislature to limit contributions and expenditures, was "foisted on the public as an all-encompassing solution to a perceived problem that does not exist." *Election Campaign Finance Reform*: Hearing on CSSB 191 Before the Senate Judiciary Committee, 19th Legis., 2d Sess., Tape 96-40, No. 278 (Apr. 19, 1996).

II. ALASKA'S LIMITS ON POLITICAL PARTIES ARE INCONSISTENT WITH *COLORADO REPUBLICAN*.

This Court has often recognized that political parties have a unique role in our political system. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). As Justice Kennedy observed, "[w]e have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity." *Colorado Republican*, 518 U.S. at 630 (Kennedy, J., concurring in the judgment and dissenting in part). The Alaska restrictions on both contributions to and contributions from a political party, however, substantially inhibit the ability of the political parties in Alaska to fulfill their traditional role in the political process.

A. Alaska Unconstitutionally Restricts Contributions Made By A Political Party To Its Candidates.

In *Colorado Republican*, this Court rejected limits on independent expenditures by political parties. The Court declined, for "prudential" reasons, to consider whether coordinated party expenditures could constitutionally be limited, and it remanded the case for further factual and

legal development.[8] 518 U.S. at 625-26. The issue reserved in *Colorado Republican* is squarely presented in this case.

Alaska campaign finance law distinguishes only between an "independent expenditure," *i.e.*, one made without coordination or consultation with a candidate, and a "contribution." What would be labeled a "coordinated expenditure" in federal law is, under Alaska law, a "contribution." Alaska thus sweeps within its annual contribution restriction coordinated expenditures made in consultation with an affiliated candidate.

The Alaska Supreme Court validated the restriction on coordinated expenditures on two grounds. First, it concluded that party contributions would otherwise provide a loophole to individual contribution limits: "[a]bsent any limits on contributions by parties, we believe there would be substantial potential for undue influence, *i.e.*, quid pro quo corruption or the appearance of corruption." App. 62a.

Second, the Court also noted "[t]he natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself." *Id.* This second ground, however, is inconsistent with the views of the four members of the *Colorado Republican* Court who addressed the question of limits on coordinated expenditures. As Justice Kennedy stated:

> [I]t would be impractical and imprudent, to say the least, for a party to support its own candidates without some form of "cooperation" or "consulta-

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[8] On remand, the Colorado District Court held the coordinated expenditure ban unconstitutional. *FEC v. Colorado Republican Federal Campaign Committee*, 41 F. Supp.2d 1197 (D. Colo. 1999).

> tion." The party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals. The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here.

518 U.S. at 630 (Kennedy, J., concurring in the judgment and dissenting in part). Similarly, as Justice Thomas noted, "[t]he very aim of a political party is to influence its candidate's stances on issues and, if the candidate takes office or is reelected, his votes." *Id.* at 646 (Thomas, J., concurring in the judgment and dissenting in part). As the "very aim" of a party is to "influence its candidate's stances on issues," the Alaska Supreme Court erred in deeming this relationship "corrupting" so as to justify the restriction on coordinated expenditures made by political parties.

B. Alaska Unconstitutionally Restricts Contributions Made To A Political Party.

Alaska law also restricts contributions *to* a political party to a far greater extent than approved by this Court in *Buckley* or *Colorado Republican*. Alaska presumes that all contributions to a political party are intended for the express advocacy of candidates.[9] That presumption is false, and it creates two related constitutional issues.

First, political parties engage in a host of necessary party-building functions, like voter registration and get-

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[9] In an informal advisory opinion of June 3, 1997, the APOC stated that "[it] has previously determined that all actions by political parties are inherently tied to the nomination and election of candidates." Letter of June 3, 1997 to Ken Jacobus at p. 2. *See* Pl.'s Reply to State's Opp'n to Summ. J. Mot., Ex. 3, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998).

out-the-vote campaigns, that do not, unlike contributions to candidates, create any risk of corruption. Federal law distinguishes "hard money" contributions to candidates that may create some risk of corruption and "soft money" contributions for party-building activities, and *Buckley* upheld limits only on contributions to candidates. *See* 424 U.S. at 23-38. Alaska law, however, does not make this distinction, and the limit on contributions to a political party, which includes funds intended for party-building activities, violates the fundamental principle that preventing corruption or the appearance of corruption are the only interests sufficiently compelling to justify limits on political contributions. *NCPAC*, 470 U.S. at 496-97. Absent a risk of corruption, Alaska may not limit contributions to a political party. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (corporate advertising on public issues does not create any risk of corruption that would justify regulation).

Second, the Alaska presumption that all contributions to a political party are intended for the express advocacy of candidates discriminates against political parties with respect to ballot issues. Alaska law permits all groups, except political parties, to accept unlimited contributions from all persons (including business entities) for the purpose of supporting or opposing ballot issues. *See* Alaska Stat. Ann. § 15.13.065(c) (Lexis 1998). Contributions to a political party, however, even if they are specifically earmarked for advocacy of ballot issues, are subject to the Alaska Act's source and amount restrictions. *See* Alaska Stat. Ann. §15.13.070(b)(2), (c)(2). Although political parties merit special constitutional protection, Alaska subjects them to more stringent restrictions than it imposes on other groups. *See Colorado Republican*, 518 U.S. at 618 ("[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political

committees the right to make unlimited independent expenditures could deny the same right to political parties) (opinion of Breyer, J.).

III. ALASKA'S CONTRIBUTION AND EXPENDITURE LIMITS ARE INCONSISTENT WITH *BUCKLEY*.

The *Buckley* Court held that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. *Buckley* and its progeny make clear that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97. The Alaska Supreme Court, however, ignored these well-settled First Amendment principles.

A. The Alaska Supreme Court Ignored *Buckley* And Upheld A Limit On Candidates' Expenditures.

Buckley held that any legitimate government interest in alleviating the corrupting influence of large contributions is "served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." 424 U.S. at 55. Expenditure limits reduce "the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *id.* at 19 (footnote omitted), and the Court held that limits on independent expenditures, on candidates' personal expenditures, and on total campaign expenditures violated the First Amendment. *Id.* at 39-58.

Notwithstanding *Buckley*, the Alaska Supreme Court upheld a limit on candidates' campaign expenditures. The Alaska Court approved so-called "spend-down" provisions that limit the amount of unused funds a candidate may carry forward to future election campaigns. App. 75a.

All other courts have held that spend-down restrictions are inconsistent with *Buckley*. *See Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1427-29 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996); *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1323 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992).

B. The Alaska Supreme Court Ignored *Buckley* and Permitted The State To Regulate Contributions Regardless of Size.

Buckley identified only "a single narrow exception to the rule that limits on political activity [are] contrary to the First Amendment" and that "exception relates to the perception of undue influence of *large* contributors to a candidate." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981) (emphasis added). The Court upheld a $1,000 contribution limit because it focused "precisely on the problem of *large* campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified." 424 U.S. at 28 (emphasis added).

Although the Alaska Supreme Court noted that a law banning contributions that are not large is "presumptively overbroad and thus invalid" under *Buckley*, App. 14a, it nevertheless upheld provisions that not only regulate "small" contributions, but in certain cases, prohibit contributions completely. For example, the Alaska Supreme Court upheld: (1) a ban on any contributions from groups not resident in Alaska; (2) a ban on any contributions from non-resident individuals to candidates once an aggregate amount of non-resident contributions have been obtained by the potential recipient; and (3) a percentage limitation on the aggregate amount that Alaska-based groups or political parties may obtain from non-

resident individuals. *See* Alaska Stat. Ann. § 15.13.072 (a)(2), (a)(3), (e), & (f) (Lexis 1998); App. 34a-35a, 40a-41a. Nothing in *Buckley* can be read to justify Alaska's prohibition against a contribution as small as $1.00.[10]

Similarly, the Alaska Supreme Court ignored *Buckley* in upholding a prohibition on contributions by candidates to other candidates or groups, *id.* at 78a, and a prohibition on contributions to candidates 45 days after an election, *id.* at 71a, without regard to the size of the contributions or their capacity to cause either corruption or the appearance of corruption.

C. The Alaska Supreme Court Upheld A $500 Contribution Limit That Is Different In Kind Than The $1,000 Limit Upheld In *Buckley*.

Buckley held that once there is evidence of the corrupting effect of *large* contributions, the Court, as a general rule, will not scrutinize a legislative determination of the appropriate limit. *See* 424 U.S. at 30. Under this standard, the Court approved a ceiling on individual contributions to candidates of $1,000 per election or $2,000 per election cycle (general and primary elections).

The Alaska Supreme Court upheld a $500 limit on individual contributions to candidates. App. 57a-58a. Even ignoring the effects of inflation in the 23 years since *Buckley* was decided,[11] this $500 limit is only 25%

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[10] The Alaska Supreme Court also upheld a prohibition on contributions from registered lobbyists to candidates representing districts other than that in which the lobbyist resides. App. 46a. Even assuming evidence showing corrupting effects from *large* contributions of this type, an absolute ban on such contributions exceeds the limits approved in *Buckley* and cannot be viewed as "narrowly tailored."

[11] When the effects of inflation are considered, assuming 3% per year, the limit approved by the Alaska court shrinks to less than

of the limit approved in *Buckley*, and as such is "differen[t] in kind." 424 U.S. at 30. No other federal or state court reviewing ceilings on individual contributions has upheld a limit lower than the $1,000 figure approved in *Buckley*.[12] *See, e.g., Shrink Missouri Government PAC v. Adams*, 161 F.3d at 521-23 (invalidating $275, $525, and $1,075 ceilings); *Russell v. Burris*, 146 F.3d at 568-71 (rejecting $300 limit for statewide elective office); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 641-43, 648 & n.24 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997) (upholding $1,000 ceiling adopted by legislature after court challenge to $500 limit); *Carver v. Nixon*, 72 F.3d at 634-44 (invalidating limits of $300, $200, and $100); *Vannatta v. Keisling*, 931 P.2d at 787 (invalidating $500 limit).

10% of the amount approved in *Buckley*. Contrary to the Alaska Supreme Court, a number of courts that have considered the constitutionality of contribution caps have taken into account the effect of inflation in making the "difference in kind" analysis. *See, e.g., Carver v. Nixon*, 72 F.3d 633, 641-42 & n.8 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The issue is currently before this Court in *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 522-23 (8th Cir. 1998), *cert. granted sub nom., Nixon v. Shrink Missouri Government PAC*, 119 S. Ct. 901 (1999) (No. 98-963).

[12] The Alaska Court agreed with the state's argument that reducing Alaska's contribution ceilings would not undermine the ability of a candidate to run an effective campaign. Plaintiff's experts disputed that conclusion. Jacobson Aff., Pl.'s Reply to State Opp'n to Mot. for Summ. J., Ex. 2, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998); Lottsfeldt Aff., *id.* Ex. 1. The state's principal evidence supporting this contention was the affidavits of several individuals relating their experiences in municipal elections. *See* App. 53a. This information is not relevant to state legislative races. *See* Lottsfeldt Aff., Pl.'s Reply to State Opp'n to Mot. for Prelim. Inj., Ex. 3, *AkCLU v. State of Alaska*, No. 3AN-97-5289 Civil (Aug. 10, 1998). Moreover, to the extent the Alaska Court shifted the burden to the AkCLU to show that the Act's contribution limits would impair the ability of a candidate to wage an effective campaign, its holding is in error. *See Edenfield v. Fane*, 507 U.S. at 770.

D. The Alaska Supreme Court Upheld Contribution and Expenditure Limits On The Basis Of Two State Interests—Leveling The Playing Field And Restricting Total Campaign Costs—That *Buckley* Rejected.

The only interest recognized by *Buckley* as sufficient to justify restricting rights of political expression is preventing corruption or the appearance of corruption. The Court specifically rejected the government's asserted need "to equalize the relative ability of all citizens to affect the outcome of elections" and to impose "a brake on the skyrocketing cost of political campaigns." *Buckley*, 424 U.S. at 26 (footnote omitted). The Court held that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49.

In upholding restrictions on non-resident contributions, the Alaska Supreme Court explicitly embraced the proscribed "leveling the playing field" rationale. It acknowledged that "[t]he State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints." App. 35a. The court concluded nonetheless that while "[t]hese non-resident contributions may be individually modest, . . . [t]hey can cumulatively overwhelm Alaskans' political contributions." *Id.* at 40a. As an attempt to "restrict the speech of some elements of society to enhance the voice of others," the Alaska Supreme Court's decision squarely contradicts *Buckley*.

In support of its decision, the Alaska Supreme Court relied on *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which it read for the proposition that the "potential for distortion" is sufficient to justify

the non-resident prohibitions. App. 40a. In *Austin*, the Court addressed restrictions on *corporate* expenditures and concluded only that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" warranted the restrictions in that case. 494 U.S. at 660. The *Austin* Court was careful to explain that the limitations did "not attempt to equalize the relative influence of speakers on elections," and further, that "the mere fact that corporations may accumulate large amounts of wealth" was not the factor justifying the restrictions. *Id.* (internal citations and quotation marks omitted). Thus, the Alaska Supreme Court misread *Austin* to support the "leveling the playing field" rationale and compounded this error by using *Austin* to justify limits on individual as opposed to corporate contributions.

IV. THE ALASKA SUPREME COURT'S DECISION RAISES QUESTIONS OF BROAD NATIONAL SIGNIFICANCE.

This Court's decision to review *Shrink Missouri Government PAC* demonstrates that the question of the evidentiary threshold necessary to sustain campaign finance regulations raises an important issue with broad national implications. At a minimum, disposition of this writ should be deferred pending resolution of the Missouri case.

Moreover, several core provisions of the Alaska law present regulatory tools which have not been directly addressed by this Court. Alaska's restrictive bias against non-residents, for example, is neither constitutionally defensible nor sound policy. The restlessness of this nation's population assures that residents of sister jurisdictions often times have personal or business ties to another state. Alaska is no exception. Indeed, Alaska's vast array of natural resources, and its status as home to a dispropor-

tionate percentage of national parks and other federal lands, uniquely affects many Americans. In the contemporary political era, "local" politics often have decidedly national implications. While this Court's prior decisions empower a state to enact restrictions protecting its electoral process against corruption or its appearance, no decisions sanction one state's intolerance of non-residents' participation in its political campaigns.

Similarly, Alaska's various restrictions on contributions to and from a political party harbor broad implications for the vitality and sustainability of our party-oriented political system. Political parties work by establishing a core philosophical ideology and by electing affiliated candidates. Alaska wrongly restricts both a party's access to the resources necessary to articulate a core ideology and its ability to elect affiliated candidates.

Finally, the Alaska Supreme Court misinterprets this Court's decisions in *Buckley, Colorado Republican,* and *Austin* to uphold an unprecedented array of campaign finance regulations and invites widespread and burdensome regulation of First Amendment activities.

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, the Court should defer disposition of the petition until it decides *Nixon v. Shrink Missouri Government PAC* (No. 98-963).

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

Supreme Court No. S-8778
Superior Court No. 3AN-97-5289 CI

STATE OF ALASKA,
Appellant,

v.

ALASKA CIVIL LIBERTIES UNION,
Appellee.

Appeal from the Superior Court of the State of Alaska,
Third Judicial District, Anchorage
Michael L. Wolverton, Judge

OPINION

[No. 5108—April 16, 1999]

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

The Alaska legislature reformed Alaska's campaign financing statutes in 1996 by enacting Chapter 48 SLA

1996, (the Act), also known as Senate Bill (SB) 191.[1] The Alaska Civil Liberties Union (AkCLU) sued the State of Alaska, seeking a judgment declaring that parts of the Act violated rights of free speech and association by restricting campaign contributions and expenditures for state and local elections. Accepting AkCLU's arguments, the superior court held that SB 191 was unconstitutional. Because we hold that the State had a legitimate interest in preventing corruption or the appearance of corruption in state election campaigns and that most of the challenged provisions were narrowly tailored to achieve that interest, we hold that the challenged provisions, with limited exceptions discussed below, do not offend rights of speech and association. Reading the bans on non-group entities' expenditures and contributions narrowly, we reverse generally the judgment declaring the Act unconstitutional. But we affirm as to the invalidity of the pre-election year and legislative session contribution bans.

II. FACTS AND PROCEEDINGS

The legislature's concern about the effect of undue influence on the work of government—first expressed in a 1913 statute requiring lobbyists to register [2]—has reached comprehensive scope in the last quarter-century. In 1974 the Alaska legislature enacted statutes regulating state election campaigns. Individuals were prohibited from contributing more than $1,000 annually to a candidate other than themselves.[3] No cash contribution exceeding

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[1] Although the bill enacted into law is generally referred to as SB 191, the version of the bill the legislature actually enacted was HCS CSSB 191 (FIN) am H.

[2] *See* ch. 43 § 1, SLA 1913.

[3] *See* ch. 76 § 1, SLA 1974 (current version at AS 15.13.070(a)).

$100 could be made to a candidate,[4] and no expenditure promoting a candidate exceeding $100 could be made unless a written receipt was filed with the state's election commission.[5] Candidates' total expenditures in campaigns for various offices were limited by formulas relating to the office sought and the population of the constituency area, and, for house and senate seats, the number of seats in the district, although the legislature later repealed this provision.[6] In 1975 the legislature expanded the $1,000 annual candidate contribution limit to cover groups, political committees, businesses, corporations, and labor unions.[7]

In 1996 the Alaska legislature comprehensively reformed Alaska's campaign financing laws by enacting SB 191. It passed the bill not long before voters were to vote on an initiative to reform campaign finance. The State asserts here, as it did below, that SB 191 was a response to the initiative and to public concerns about actual and apparent corruption in Alaska politics. The Act recited these legislative findings:

> (3) organized special interests are responsible for raising a significant portion of all election campaign funds and may thereby gain an undue influence over election campaigns and elected officials, particularly incumbents . . .
>
> . . . .
>
> (5) because, under existing laws, candidates are completely free to convert campaign funds to per-

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[4] *See* ch. 76 § 1, SLA 1974 (current version at AS 15.13.070(b)).

[5] *See* ch. 76 § 1, SLA 1974 (current version at AS 15.13.070(c)). The 1974 enactment did not distinguish between coordinated and independent "expenditures."

[6] *See* former AS 15.13.070(f), *repealed by* ch. 85 § 45, SLA 1986.

[7] *See* ch. 189 § 20, SLA 1975 (current version at AS 15.13.070(a)).

sonal income, there is great potential for bribery and political corruption.[8]

The Act also expressed the following purpose: "It is the purpose of this Act to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." [9]

Senate Bill 191, while less restrictive in some areas, was more comprehensive in scope than the initiative it sought to supplant. Unlike the initiative, SB 191 included not only contribution limits and prohibitions, and expenditure prohibitions, but time restrictions, restrictions on the use of campaign assets, restrictions on the use of gaming proceeds, exemptions from reporting requirements, campaign lending restrictions, and standards of criminal conduct.[10]

Senate Bill 191 became effective January 1, 1997.[11]

AkCLU sued the State in July 1997. It complained that the Act violated both the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and article I, section 5 of the Alaska Constitution. It sought declaratory and injunctive relief specifically challenging the validity of the Act's provisions containing (1) limits on campaign contributions; (2) bans on certain types of campaign contributions; (3) restrictions on the timing of contributions; (4) restrictions, which AkCLU characterized as expenditure limitations, on campaign funds carry-forwards

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[8] Ch. 48 § 1, SLA 1996.

[9] *Id.*

[10] *See* ch. 48 §§ 2, 5-7, 11-12, 19, 25, SLA 1996.

[11] *See* ch. 48 § 35, SLA 1996.

and inter-candidate contributions; and (5) bans on independent expenditures by certain organizations.

AkCLU moved for complete summary judgment, relying heavily on the United States Supreme Court's opinion in *Buckley v. Valeo*, which requires a threat of corruption or the appearance of corruption to justify regulation of campaign speech.[12] AkCLU submitted no factual evidence. The State opposed AkCLU's motion, cross-moved for summary judgment, and submitted more than 1800 pages of documents. The documents included: independent studies; a study commissioned by the state senate; fifteen affidavits including affidavits from former Governors Steve Cowper, Jay Hammond, and Walter Hickel, and former house member David Finkelstein; news clippings; Alaska Public Offices Commission (APOC) reports; and campaign disclosure records. AkCLU's reply attached the affidavit of an advertising firm account manager. AkCLU later submitted two additional affidavits in support of its motion for preliminary injunction.

The State's evidence discussed the proposed campaign finance initiative and the drive to place it on the ballot in 1996. The initiative contained a finding, as noted above, that "[o]rganized special interests are responsible for raising a significant portion of all campaign funds, and may thereby gain an undue influence over campaigns and elected officials, particularly incumbents."

Michael Frank, chair of Campaign Finance Reform Now!, the ballot measure organizers, affied that over 30,000 people signed the petition for the ballot initiative. Frank said he heard frequent comments from citizens who said that "after candidates got elected they 'went bad' or 'became corrupt' or 'got crooked' or 'went on the take' and began accepting contributions and favors from the

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12 *See Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

interests they were supposed to regulate." Frank stated his personal view that the existing system "reeked of corruption."

Michele Keck, who also collected signatures for the initiative, affied that she got involved because "[t]he decisions of elected officials appear too often to be linked to campaign contributors [rather] than to the merits of the issues." She said she collected approximately 5,000 signatures for the initiative, and her impression was that others who signed the petition felt the same way she did.

David Finkelstein, a former state house member, affied that he personally had gathered over a thousand signatures for the campaign reform initiative. "The constant refrain I heard from citizens," he said, "was that the Legislature was owned by special interests. This perception existed even among people who would not sign the initiative, who would often state that nothing was going to change the corruption caused by big money."

The State also introduced a report commissioned by the Alaska State Senate and produced by the Josephson Institute in 1990. The report discussed the opinions of lobbyists, legislators, and state public officials on legislative ethics in Alaska. The researchers found that: "the level of trust and confidence in the integrity of the legislature is disturbingly low"; the low level of trust is attributable at least in part to "calculated evasions of the purpose and spirit of campaign laws"; and calculated evasions of the campaign laws were, according to fifty percent of legislators and sixty-eight percent of public officials, a serious problem calling for greater regulation.

Following oral argument, the superior court granted summary judgment to AkCLU. The court primarily relied upon *Buckley*, and gave several reasons for its result: the State had not introduced evidence of "real

harm"; SB 191's contribution limits are impermissibly "differen[t] in kind" from the *Buckley* limits; and "leveling the playing field" is an inadequate justification for restricting campaign contributions. Concluding that the valid and invalid provisions were "so inextricably intertwined" that the valid provisions could not be severed and preserved, the court invalidated the entire Act, including those provisions AkCLU did not explicitly challenge, as unconstitutional under the First Amendment.

The State appeals.

III. DISCUSSION

A. *Standard of Review*

We review grants of summary judgment de novo.[13] To obtain summary judgment, the moving party must prove the absence of genuine factual disputes and its entitlement to judgment.[14]

> If the movant makes a prima facie showing that he or she is entitled to judgment on the established facts as a matter of law, the opposing party must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.[15]

When a court grants summary judgment without stating its reasons, we presume that the court ruled in the movant's favor on all the grounds stated.[16] All reasonable

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13 *See Nielson v. Benton*, 903 P.2d 1049, 1052 (Alaska 1995).

14 *See Alaska Travel Specialists, Inc. v. First Nat'l Bank of Anchorage*, 919 P.2d 759, 762 (Alaska 1996).

15 *French v. Jadon, Inc.*, 911 P.2d 20, 23 (Alaska 1996).

16 *See State v. Appelton & Cox of Cal., Inc.*, 703 P.2d 413, 414 (Alaska 1985).

inferences of fact must be drawn against the moving party and in favor of the nonmoving party.[17]

This case raises constitutional issues. Issues of constitutional interpretation are questions of law which we review de novo.[18]

B. *History of Campaign Finance Litigation*

1. *Buckley v. Valeo*

Buckley v. Valeo is the wellspring of modern campaign finance jurisprudence. The Supreme Court there reviewed contribution and expenditure limits contained in the 1974 amendments to the Federal Election Campaign Act of 1971.[19] It concluded that all campaign finance restrictions impinge on public debate and therefore implicate the First Amendment.[20] "[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties . . . ." [21]

Accordingly, the Court held that campaign finance reform measures limiting expenditures must satisfy "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." [22] Concerning contribution limits, the Court explained that "[e]ven a 'significant interference with protected rights . . .' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid un-

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17 *See Ross v. City of Sand Point*, 952 P.2d 274, 276 (Alaska 1998).

18 *See Revelle v. Marston*, 898 P.2d 917, 925 n.13 (Alaska 1995).

19 *See Buckley*, 424 U.S. at 6.

20 *See id.* at 18.

21 *Id.*

22 *Id.* at 44-45.

necessary abridgment of associational freedoms." [23] The Court later explained that to be constitutional, a provision burdening the exercise of political speech must be "narrowly tailored to serve a compelling state interest." [24]

Buckley addressed limits on contributions and expenditures in election races for federal office.[25] In doing so, the Court upheld the contribution limits but struck down the expenditure limits, drawing a distinction that the Court has continued to observe.[26]

The challenged expenditure limits, the Court reasoned, were invalid because they directly and substantially limited the quantity of political speech.[27] The 1974 amendments limited individual and group expenditures to $1,000 per election for clearly identified candidates, thus preventing, for example, a one-quarter page advertisement in a major metropolitan newspaper.[28] The Court found that the governmental interest in preventing corruption and the appearance of corruption was inadequate to justify the

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23 *Id.* at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975) (internal quotation omitted)).

24 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990).

25 *See Buckley*, 424 U.S. at 12-59.

26 *See, e.g., Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618-19 (1996) (striking down limit on independent expenditures by political parties); *Federal Election Comm'n v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238, 263-64 (1986) (striking down expenditure limit); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985) (striking down limit on political committee expenditures); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 198-201 (1981) (allowing limits on contributions to political committees).

27 *See Buckley*, 424 U.S. at 19-20, 39, 58-59.

28 *See id.* at 40.

ceiling on independent expenditures, for two reasons.[29] First, the "exacting interpretation" needed to avoid unconstitutional vagueness would render the ceiling ineffective.[30] Second, there was little danger genuinely independent expenditures (those absent prearrangement and coordination) would be made as a quid pro quo for the candidate's "improper commitments."[31] The ceiling therefore served no "substantial government interest" but heavily burdened core First Amendment expression.[32] The Court also rejected, as insufficiently compelling, other rationales for campaign finance reform, including "leveling the playing field."[33]

But the Court reasoned that contribution limitations, in contrast, primarily implicate associational rights.[34] The Court explained that

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[29] *See id.* at 45-47.

[30] *Id.* at 45.

[31] *Id.* at 47.

[32] *Id.* at 47-48.

[33] *Id.* at 48-51. The Court stated:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 48-49 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (citations omitted)).

The Court also rejected expenditure limits on campaigns for federal office, noting that the Act's contribution limits and disclosure provisions would serve to alleviate the "major evil" associated with rapidly increasing expenditures—"the danger of candidate dependence on large contributions." *Id.* at 55.

[34] *See id.* at 24-25.

> a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.[35]

The Court held that while the interest in preventing corruption and the appearance of corruption is not compelling enough to limit speech directly by limiting expenditures, it is a sufficiently compelling interest to justify contribution restrictions.[36] The Court noted the absence of any indication the contribution limits "would have any dramatic adverse effect" on the funding of campaigns and political associations:

> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather

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35 *Id.* at 20-21.

36 *See id.* at 25-29.

than to reduce the total amount of money potentially available to promote political expression.[37]

The Court then discussed the primary purpose of the 1974 amendments: "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." [38]

It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime

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[37] *Id.* at 21-22 (footnote omitted).

[38] *Id.* at 25.

> of large individual financial contributions. . . . Here . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent." [39]

The Court also rejected contentions that other less restrictive means—bribery laws and disclosure requirements—existed.[40] "Congress was surely entitled," the Court said, to view contribution ceilings as "a necessary legislative concomitant" for dealing with even disclosed contributions.[41]

The Court concluded that the $1,000 contribution ceiling was valid, and noted: "Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties."[42] The Court similarly rejected challenges to a $5,000 limitation on political committees' contributions, a limitation on volunteers' incidental expenses, and a $25,000 annual limitation on individuals' total contributions.[43]

The *Buckley* Court set out three potential outer limits on contribution restrictions. First, it noted that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented

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39 *Id.* at 26-27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973)).

40 *See id.* at 28-29.

41 *Id.* at 28.

42 *Id.* at 28-29.

43 *See id.* at 35-38.

candidates and political committees from amassing the resources necessary for effective advocacy." [44] Restrictions preventing "effective advocacy" would directly impact speech, and therefore would be invalid. Second, the Court warned that at some level contribution limits would become so low that "distinctions in degree" between limits would become "differences in kind." [45] Third, it approved the limits intended to prevent corruption through "large" contributions, but warned that a statute barring contributions that were not "large" would be presumptively overbroad and thus invalid.[46]

2. *After Buckley*

Since deciding *Buckley*, the Court has fleshed out its implications. The Court has invalidated some restrictions, finding no danger of corruption in independent expenditures by political action committees (PACs)[47] or political parties,[48] or in individual contributions relating to initiative campaigns, where there is no danger of an improper quid pro quo.[49] The Court has upheld restrictions on indirect contributions to candidates, such as contributions to PACs.[50] It has also rejected speech-restrictive campaign reforms whose only purpose was to lower the cost of elections.[51]

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[44] *Buckley*, 424 U.S. at 21.

[45] *Id.* at 30.

[46] *Id.* at 28-29.

[47] *See National Conservative Political Action Comm.*, 470 U.S. at 497-98.

[48] *See Colorado Republican*, 518 U.S. at 618-19.

[49] *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-300 (1981).

[50] *See California Med. Ass'n*, 453 U.S. at 197-99.

[51] *See, e.g., Colorado Republican*, 518 U.S. at 618 (striking down limit on independent political party expenditures).

Its decisions have closely examined campaign restrictions on various organizations. Long before *Buckley*, federal law had prohibited contributions and expenditures by corporations and labor organizations.[52] Post-*Buckley* decisions narrowed the permissibility of such restrictions. In 1978 the Court reaffirmed the corporate right to speak and invalidated restrictions on corporate expenditures relating to ballot initiatives.[53] It reasoned that corporate speech, like individual speech, "furthers the societal interest in the 'free flow of commercial information.' "[54]

In 1986, in *Federal Election Comm'n v. Massachusetts Citizens for Life (MCFL)*, the Supreme Court declared that some nonbusiness, political corporations are protected from campaign finance limitations.[55] Because the corporation involved there, Massachusetts Citizens for Life (MCFL), had been formed to promote political ideas, had no shareholders, and was independent from the influence of business corporations, the Court reasoned that MCFL's political expenditures did not pose the same dangers as those of a typical corporation.[56]

In 1990, in *Austin v. Michigan Chamber of Commerce*, the Supreme Court upheld the application of a state corporate campaign expenditure ban to a nonprofit corporation.[57] Its rationale—that corporations' "unique state-

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[52] *See MCFL*, 479 U.S. at 246-47; *see also* Taft-Hartley Act, ch. 120, § 304, 61 Stat. 136, 159 (1947).

[53] *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784 (1978).

[54] *Id.* at 783 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)). The Court also found no danger of corruption in a ballot initiative campaign, where no corruptible candidate existed. *See id.* at 790.

[55] *See MCFL*, 479 U.S. at 263-64.

[56] *See id.*

[57] *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990).

conferred corporate structure that facilitates the amassing of large treasuries" poses a danger of corruption—announced a second model for potential political corruption which justifies regulation of political speech.[58] *Austin* preserved, however, the exception for nonbusiness, political corporations that meet the three criteria announced in *MCFL*.[59]

These cases leave us with a jurisprudence based on the threat of corruption and the appearance of corruption, and dependent on case-specific analysis. Speech relating to ballot initiatives (where quid pro quo corruption is not a significant danger) is entirely protected.[60] In campaigns for political office, individual speech is protected to the extent it is independent and poses no danger of quid pro quo arrangements; contributions and coordinated expenditures are subject to regulation. Corporations that meet special nonbusiness criteria (as per *MCFL*) pose no danger of corruption, and have rights similar to those of individuals. But corporations that do not meet those criteria are—given the threat of corruption their state-created advantages pose—completely subject to regulation.

We should note here that AkCLU would have us apply strict "real harm" standard, over and above the "compelling interest-narrowly tailored" standard. AkCLU argues that "the Supreme Court—and all other courts—require a threshold showing that a proposed restriction on First Amendment rights is justified by evidence of 'real harm' of a constitutionally cognizable interest . . . ."

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[58] *Id.*

[59] *See id.* at 661-65.

[60] *See Citizens Against Rent Control*, 454 U.S. at 298-300; *Bellotti*, 435 U.S. at 790.

The Supreme Court articulated this threshold test in *Turner Broadcasting System, Inc. v. FCC*:

> When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[61]

But the Court tempered that statement:

> We agree that courts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether.[62]

This standard of review, said the Court,

> is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. . . . "[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical sup-

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61 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (quoting *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

62 *Id.* at 666 (citations omitted).

> port or at least sound reasoning on behalf of its measures." [63]

We believe the real harm test does not require exhaustive proof of corruption in this context, but merely, in the words of the Court, "empirical support or at least sound reasoning" in favor of the measures defended.

We turn now to those provisions of the Act specifically challenged by AkCLU.

C. *Ban on Independent Expenditures by "Non-group" Entities; AS 15.13.135*

The Act bans any entity from making independent expenditures [64] to support or oppose a candidate for state office unless the entity qualifies as a "group." [65] The definition of "group" is AS 15.13.135 effectively precludes business corporations, labor organizations, and other entities from making such expenditures.[66]

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[63] *Id.* (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)).

[64] AS 15.13.400(7) defines an "independent expenditure" as:

> an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate.

[65] AS 15.13.400(5)(B) defines "group" to mean "any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election." An "individual" is a "natural person." AS 15.13.400(8).

[66] AS 15.13.135(a) provides, in pertinent part: "Only an individual or group may make an independent expenditure supporting or opposing a candidate for election to public office . . . ."

AkCLU and Amicus Alaska State Chamber of Commerce argue that the Act as a whole, and in part through AS 15.13.135, unconstitutionally interferes with the political speech of corporations, labor unions, unincorporated organizations, the Chamber, and its members by banning or limiting their independent expenditures and campaign contributions. AkCLU claims that the State has not articulated a compelling interest and has offered no evidence of "real harm" justifying any restraint on speech, and that the State's evidence of corruption is little more than a discussion of the amounts corporations contributed before the Act became effective. It asserts that the State's desire to limit corporations' disproportionate influence reflects the discredited "level playing field" motive. It argues that the independent expenditures ban cannot satisfy federal law because Alaska law does not permit alternative participation by business and labor entities. AkCLU notes, for example, that federal law allows corporations and other entities to make unlimited contributions to political parties to use in general party activities.[67] AkCLU also argues that Alaska law restricts non-group "issue advocacy."

The State, relying on *Austin*, argues that the expenditure prohibition is justified by the need to avoid the "disproportionate impact" non-group entities would have on the political process. Citing *Austin*[68] and Brookings Institution scholar Daniel Ortiz,[69] the State argues that while the Supreme Court has characterized the interest as one of preventing a form of corruption, "the interest

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[67] The Act, by contrast, bans such contributions. *See* AS 15.13.074(f).

[68] *See Austin*, 494 U.S. at 658-61.

[69] *See* Daniel Ortiz, "The First Amendment at Work: Constitutional Restrictions on Campaign Finance Regulation," *Campaign Finance Reform: A Sourcebook* (1997).

is actually an interest in preventing the corporate voice from overwhelming individuals' voices, i.e., in leveling the playing field."

The State also argues that the expenditure prohibition is needed to prevent these entities from avoiding the contribution prohibition, contained in AS 15.13.074(f) and discussed below, that also applies to them. It argues that courts have upheld restraints on union and corporate expenditures in candidate elections, and it minimizes the impact of the ban by arguing that these entities still have ample alternatives for political expression. It responds to the overbreadth issue by arguing that APOC has prohibited independent expenditures for or against candidates by corporations or labor organizations using corporate or union treasury funds.[70] It argues that in cases involving issue-oriented nonprofit corporations, courts apply a narrow construction to avoid any constitutional defect.

Absent meaningful argument tracing the cumulative effect of the Act's limitations on independent expenditures and contributions of "non-group" entities, we cannot assess exactly how these restraints function together, and how they differ in actual, real-world effect from restrictions found in the Federal Election Campaign Act or the Michigan statutes discussed in *Austin*. Given the Supreme Court's distinction between independent expenditures and contributions,[71] we deal here with these provisions separately, and first address AS 15.13.135 because the First Amendment gives greater protection to independent expenditures.

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[70] *See* Greg Granquist, APOC Advisory Opinion AO 97-09-CD (approved June 19, 1997).

[71] *See Buckley*, 424 U.S. at 14-23.

1. *Corporations and labor unions*

Our review of AS 15.13.135 requires us to return to *Austin*. Restraints on campaign expenditures by corporations and labor unions have long been part of federal law, and have long been upheld. In *Austin*, the Supreme Court upheld an independent expenditure ban as applied to a nonprofit corporation, the Michigan State Chamber of Commerce.[72] Because the Michigan statute permitted an alternative method for making expenditures, through "separate segregated funds," the Court held that the restriction was narrowly tailored.[73] It based its holding on " 'the compelling governmental interest in preventing corruption [from] political war chests funneled through the corporate form.' " [74] The Court determined that the special "state-created advantages" of the corporate form allow corporations to amass large sums of money, potentially giving them "an unfair advantage in the political marketplace." [75]

The Court reiterated its explanation from *MCFL* that the political advantage of corporations is

> unfair because "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of

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[72] *See Austin*, 494 U.S. at 660.

[73] *Id.* at 660.

[74] *Id.* at 659 (quoting *National Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985)).

[75] *Id.* (quoting *MCFL*, 479 U.S. at 257).

> the corporation may be no reflection of the power of its ideas." [76]

The Michigan State Chamber argued that concern about corporate domination was insufficient to justify restricting independent expenditures. The *Austin* Court noted that in *First National Bank v. Bellotti*, it had recognized that a legislature might demonstrate a danger of real or apparent corruption posed by corporate expenditures made to influence candidate elections.[77] The *Austin* Court then noted that the danger of financial quid pro quo corruption is not the only possible justification for restricting independent expenditures:

> Regardless of whether this danger of "financial quid pro quo" corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.[78]

The Court thus identified a second way in which the political process may be corrupted: through the disproportionate political influence corporate wealth can have because it bears no necessary relationship to the actual public support for the corporation's political views. This potential for distortion, rather than any actual or apparent danger of quid pro quo corruption, provided the threat that justified the Michigan statute in the Court's

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76 *Id.* (quoting *MCFL*, 479 U.S. at 258).

77 *See id.* (citing *Bellotti*, 435 U.S. at 788 n.26).

78 *Id.* at 659-60 (citations omitted) (quoting *National Conservative Political Action Comm.*, 470 U.S. at 497).

eyes. The Court has not retreated from its analysis in *Austin*.

Applying *Austin*, we must first determine whether a "compelling state interest" justifies any restriction on non-group entities' independent expenditures in campaigns for elected office.

The State introduced substantial evidence—discussed in Part II—generally relating to corruption and the appearance of corruption. Some of the State's evidence discussing both expenditures and contributions confirms the disproportionate influence of corporate and labor union participation recognized in *Austin*.

For example, Larry Makinson states in *Open Secrets* that the top fifty contributors (not including political parties) donated about a third of the dollars received by Alaska legislative candidates in the 1986 election.[79] These fifty consisted of twenty-one corporations, nine labor unions, eight PACs and trade associations, six law and lobbying firms, and six individuals.[80]

Former Alaska Governor Steve Cowper affied that under the old rules "[c]ontributions were bundled by corporations and unions from officers and employees associated with them so that greater amounts were given to candidates thereby increasing the amount given to a particular candidate and increasing the influence of the core contributor." He also stated that "[t]hese business entities are given a special ability to accumulate money for business purposes . . . . Because of the wealth of unions and corporations, they can obtain more influence over elected officials than the individuals who elect them."

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[79] *See* Larry Makinson, *Open Secrets* 7 (1987).

[80] *See id.* at 9.

An Alaska Public Interest Research Group (AKPIRG) report claimed to show that "business interests control over half of campaign contributions" to candidates.[81] This did not, the report said, consider "the fact that donations to political parties are largely dominated by business." [82]

APOC data supported the disproportionate-influence theory by demonstrating that the vast majority of donations to the House Republican Majority Fund in 1996 was made by corporations, trade associations, or their PACs.

In 1989 four of the five APOC members supported bans on contributions by PACs, unions, and corporations. They explained their stance under the theory that "apart from political parties, only those who may vote should be entitled to contribute to candidates" to minimize the appearance of "special influence" by "special interests."

The State introduced the proposed campaign finance initiative and affidavits relating to the drive to place it on the ballot in 1996. As noted in Part II, the initiative contained a finding that "[o]rganized special interests are responsible for raising a significant portion of all campaign funds, and may thereby gain an undue influence over campaigns and elected officials, particularly incumbents." [83]

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[81] Janet Campbell, *The Best Politicians Money Can Buy* 15 (1995).

[82] *Id.*

[83] This perception of the dangers of undue influence is reinforced by a recent study of federal government written by Charles Lewis and the Center for Public Integrity. In *The Buying of the Congress*, Lewis discusses examples of areas in which members of Congress accepted large contributions and resisted compelling legislation that would have been costly to their contributors. *See* Charles Lewis, *The Buying of the Congress* 83-104 (food safety),

No evidence regarding business corporations seems necessary. We think the reasoning underlying *Austin* resolved that issue as a matter of law. And it is equally clear that labor organizations may be barred from making independent expenditures in candidate campaigns.[84] The Court considered and upheld the constitutionality of the segregation requirements as they applied to labor unions.[85] We therefore hold that the State has a compelling interest that justifies applying AS 15.13.135 to business corporations and labor unions.

2. *Other non-group entities*

But the evidence discussed above and in Parts II and III.D of this opinion and the other evidence introduced in the superior court does not directly establish whether AS 15.13.135 permissibly may be applied to entities other than business corporations and labor unions.

The Supreme Court appears to have recognized that unions and corporations are not the only organizations potentially subject to treatment different from that accorded individuals. In *Federal Election Comm'n v. National Right to Work Committee,* the Court noted that "there is no reason why [the governmental interest in preventing actual corruption and the appearance of corruption of elected representatives] may not in this case be accomplished by treating unions, corportions, and *similar organizations* differently from individuals."[86] In

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105-25 (tobacco), 142-65 (pharmaceuticals), 166-83 (occupational safety), 184-95 (aviation safety), 199-218 (health care), 253-66 (telecommunications), 285-302 (antitrust regulation) (1998).

[84] *See* 2 U.S.C. § 441b(a) (1994); *MCFL,* 479 U.S. at 247-48.

[85] *See Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 210 (1982).

[86] *Id.* at 210-11 (emphasis added).

MCFL, the Court noted that corporations are "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." [87]

Although AS 15.13.135 clearly includes organizations that are not business corporations or labor organizations, the parties have not meaningfully discussed the differences in the organizational forms of "non-group" entities. The Alaska statutes permit various forms of unincorporated organizations.[88] Some, such as limited partnerships, have many of the attributes of corporations. A general partnership or limited liability partnership has some of these attributes, if not perpetual life. These organizations, like corporations, can amass large treasuries from their business operations and the capital contributions of their investors. And controlling partners or general partners might vote to spend some of the business treasury to support or oppose state election candidates over the objections of minority or limited partners, who, like corporate shareholders, have a stake in the business but no effective voice.

Some aspects of the corporate form are unique, as *Austin* seems to recognize. But we conclude that the corporate form is not determinative. Nor is size determinative, because the Court has declined to distinguish between widely-held and closely-held corporations.[89] Equally non-determinative is actual wealth, because the Court has reasoned that it is the potential for unfair in-

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[87] *See MCFL*, 479 U.S. at 258 n.11.

[88] *See, e.g.*, AS 10.50.010 (limited liability companies); AS 32.05.010 (partnerships); AS 32.11.010 (limited partnerships).

[89] *See Austin*, 494 U.S. at 661; *National Right to Work Comm.*, 459 U.S. at 199, 210-11 (a nonprofit corporation without capital stock).

fluence that justifies regulation.[90] For instance, in *MCFL* the Court invalidated an independent expenditure ban as it applied to a small, non-profit corporation that had purely political purposes.[91] The Court reasoned:

> Regulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption, MCFL was formed to disseminate political ideas, not to amass capital.[92]

We agree with AkCLU that AS 15.13.135 as written embraces "non-group" entities whose speech may not be permissibly restricted by an expenditure prohibition.[93] But we cannot fully resolve the extent of any statutory overbreadth in this appeal in context of particular organizational forms or specific entities on the basis of the arguments and record before us.

We decline to strike down the statute on the theory the expenditure ban is overbroad as written. We choose instead to read the statute narrowly in order to prevent it from applying to "non-group" entities whose speech is

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[90] *See Austin*, 494 U.S. at 661; *National Right to Work Comm.*, 459 U.S. at 210 ("[W]e accept Congress's judgment that it is the potential for such influence that demands regulation.").

[91] *See MCFL*, 479 U.S. at 263.

[92] *Id.* at 259.

[93] It appears that APOC reads AS 15.13.135 in a manner consistent with *MCFL*, holding that the Republican Party of Alaska is not subject to the corporate prohibitions of AS 15.13.074(f) (prohibiting political contributions by corporations). The APOC has held that the Republican Party of Alaska, notwithstanding its corporate status, is a political party. *See* APOC Advisory Opinion AO 97-08b-CD (approved November 5, 1997).

constitutionally protected.[94] Entities which are neither labor unions nor corporations are subject to expenditure bans only to the extent they are within the class of organizations potentially able to amass great wealth through state-created advantages.[95] We therefore read AS 15.13.-135 in accordance with the three conditions *Austin* discussed in describing the *MCFL* exception. Thus, entities must be exempted from AS 15.13.135's ban if (1) they cannot participate in business activities, (2) they have no shareholders who have a claim on corporate earnings, and (3) they are independent from the influence of business corporations.[96]

AkCLU asserts that exemptions may not be sufficient to avoid chilling speech because even entities that meet these criteria for exemption might be afraid to make expenditures for fear of prosecution. But we conclude that those criteria, approved by the Supreme Court, are sufficiently definite to provide meaningful guidance to would-be contributors. We also think it wise to resolve the ultimate boundaries of this statutory prohibition in the context of legal challenges asserting specific facts concerning particular organizations or types of organizations.

This narrowed construction of the prohibition leaves ample room for individuals involved in organizations to engage in political speech.

AkCLU argues, in essence, that this prohibition, in conjunction with other provisions—such as AS 15.13.-074(f)—leaves affected entities with no avenues for po-

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[94] *See Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Gottschalk v. State*, 575 P.2d 289, 295 (Alaska 1978).

[95] *See Austin*, 494 U.S. at 659.

[96] *See Federal Election Comm'n v. Survival Educ. Fund*, 65 F.3d 285, 291 (2d Cir. 1995) (citing *Austin*, 494 U.S. at 662-64).

litical speech. It suggests that there is no oportunity for such entities to establish segregated funds, in comparison with the Michigan statute discussed in *Austin*. It claims that these restraints on independent expenditures and candidate contributions are far more restrictive than those imposed by federal law, which it notes permits corporations and other entities to make unlimited contributions to a political party for use in general party activities.[97] The Alaska State Chamber of Commerce notes that the Michigan statute permitted corporations to form PACs.

But in our view, nothing prevents individual organizers of non-group entities from either forming a "group" to collect contributions and make expenditures, or soliciting individual contributions from other members without relying on treasury funds. Further, it appears that non-group entities may communicate their endorsements to their employees or members.[98] The State also contends that be-

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[97] Federal law bars contributions or expenditures by corporations "in connection with" federal elections. *See* 2 U.S.C. § 441b(a). This impliedly leaves room for corporations to give parties contributions not "in connection with" particular candidates or elections. *Cf.* 2 U.S.C. § 441b(b)(2) (permitting nonpartisan registration and get-out-the-vote campaigns by corporations aimed at associated individuals).

[98] 2 AAC 50.313(1)(4) provides that the following does not constitute a "contribution" under 2 AAC 50.310-.405:

> a payment made by a business, corporation, trade association, labor organization, or other organization not organized primarily to influence elections to communicate directly with its members or employees, or their families, on any subject, if the communication is of the same format and nature used by the organization when it has communicated in the past on nonpolitical subjects, does not request members or their families to do anything other than exercise the right to vote, and does not solicit individual contributions to a clearly identified candidate or group chosen by the organization . . . .

See also J. Kohout, APOC Advisory Opinion AO 97-20-CD (approved June 24, 1998).

cause organized entities meet the definition of "person" in AS 01.10.060(8), they may make contributions and expenditures for ballot propositions or questions even though they may not make them for or against candidates under AS 15.13.135 and AS 15.13.065.

We note too that the only remedy a dissident participant may have in such business entities, regardless of their size, when disagreeing with use of the entity's wealth for political speech, is potentially ruinous: withdrawal from the organization. In *National Right to Work Committee*, the Court upheld a statute barring contributions or expenditures by corporations, labor unions, and national banks in connection with federal elections, in part because it protected individuals who have paid money into the entity for purposes "other than the support of candidates from having that money used to support political candidates to whom they may be opposed."[99] In *Austin*, the Court noted that because members have a significant incentive to continue their financial support for the Michigan State Chamber whatever their opinion of its political agenda, disclosure will not ensure that the funds in the Chamber's treasury correspond to members' support for its ideas.[100]

Because the expenditure ban serves all these myriad purposes in a narrowly tailored fashion, we reverse the superior court's invalidation of AS 15.13.135.

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[99] *National Right to Work Committee*, 459 U.S. at 208. *See also* 2 U.S.C. § 441b; *MCFL*, 479 U.S. at 264 (discussing the importance of ensuring that persons connected with the organization "will have no economic disincentive for dissociating with it if they disagree with its political activity.").

[100] *See Austin*, 494 U.S. at 663 n.2.

D. *Contribution Restrictions*

1. *Contribution bans*

a. *Bans on contributions by "non-group" entities; AS 15.13.074(f)*

The Act prohibits a "corporation, company, partnership, firm, association, organization, business trust or surety,[101] [or] labor union" from contributing to a candidate or "group." [102]

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[101] The origin and purpose of the reference to "surety" is uncertain. A "surety" is "[a] person who is primarily liable for payment of debt or performance of obligation of another." *Black's Law Dictionary* 1441 (6th ed. 1990). It is not obvious how suretyship relates to campaign finance.

The State suggests that "surety" was inadvertently substituted for "society," a term which appears in AS 01.10.060(8). Four statutes contain equivalent lists which include "society" but not "surety." *See* AS 01.10.060(8) (general list of statutory definitions); AS 16.43.990(5) (commercial fisheries); AS 30.13.900(5) (regional resource development authorities); AS 30.17.900(7) (Adak Reuse Authority).

Sutherland Statutory Construction states that "if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results," courts will ordinarily modify the statute to comport with legislative intent. Norman J. Singer, *Sutherland Statutory Construction* § 46.07 (5th ed. 1992). We agreed with that proposition when we held that "to construe statutes so as to avoid results glaringly absurd has long been a judicial function." *Sherman v. Holiday Constr. Co.*, 435 P.2d 16, 19 (1967) (quoting *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332-33 (1938)). But for purposes of the present appeal it is not necessary to decide whether AS 15.13.074(f) applies to a "surety" or a "society."

[102] AS 15.13.074(f) provides: "A corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or publicly funded entity that does not satisfy the definition of group in AS 15.13.400 may not make a contribution to a candidate or group."

This outright ban on contributions directly implicates both political speech rights and associational rights of would-be contributors.

But, in light of the facts discussed in Part II and III.C, we hold that Alaska has a substantial governmental interest in campaign finance reform that justifies some restriction on First Amendment freedoms. We conclude that the considerations which justify the ban on independent expenditures by "non-group" entities (*see* Part III.C) also justify this contribution ban.

As we noted in Part III.C.2, the list of "non-group" entities subject to the ban is overbroad, and must be read in a manner consistent with the constitution. We again agree with the State's argument that such bans are potentially valid for reasons discussed in *Austin*: the "state-created advantages" of the corporate form create "an unfair advantage in the political marketplace." [103] Organizations that do not benefit from such advantages—most clearly, entities like MCFL [104]—are not subject to such restrictions. Entities which are neither labor unions nor corporations are subject to contribution bans only to the extent they are within the class of organizations potentially able to amass great wealth through state-created advantages.[105] We believe the permissible scope of these bans is best determined in context of fact- and class-specific litigation,[106] especially given the lack of briefing

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[103] *Austin*, 494 U.S. at 659 (citations omitted).

[104] *See MCFL*, 479 U.S. at 259.

[105] *See supra* Part III.C. *See also Survival Educ. Fund*, 65 F.3d at 291.

[106] *See Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987) ("standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has [brought] or is likely to bring suit"); *see also San Francisco Drydock, Inc. v.*

on the issue here. We therefore do not now attempt to list which types of entities the statute may permissibly affect.[107]

AkCLU and the Chamber both contend that the restrictions on contributions and expenditures by corporations and labor unions, considered together, are so extreme as to constitute bans on issue advocacy. We disagree. Alaska Statute 15.13.135 (under our restricted interpretation) bars corporations and corporation-like entities only from making "independent expenditure[s] supporting or opposing a candidate for election to public office." Under this rule, if "explicit words of advocacy of election or defeat of a clearly identified candidate" [108] are required to show support or opposition, issue advocacy will not be affected by the Act. We therefore reject AkCLU's argument that *Austin* must be read narrowly and that the State has offered no evidence justifying the contribution ban.

We also reject the Chamber's assertion that the ban is overbroad because it includes organizations that are not

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Dalton, 131 F.3d 776, 778 (9th Cir. 1997) (noting that it is appellate court's "obligation to be sure that standing exists and to raise, sua sponte if need be, any deficiency").

[107] AS 15.13.074(f) also bans contributions by a "publicly funded entity." This provision potentially implicates the "unconstitutional conditions" doctrine. But no party discusses the issue here or the seminal case, *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Supreme Court upheld a speech regulation as a valid condition on federal funding, and distinguished between a permissible withheld subsidy and an impermissible forced silence. *See id.* at 194, 196.

We therefore do not consider whether this section simply bans the use of government funds, or completely bans campaign-related political speech.

[108] *Federal Election Comm'n v. Christian Action Network*, 110 F.3d 1049, 1062 (4th Cir. 1997) (quoting *Buckley*, 424 U.S. at 80).

wealthy. Because it is the potential for corruption or the appearance of corruption that justifies the restraint, the actual wealth of a given organization is irrelevant. It is enough that the entity operate in a form which has benefitted from "state-created advantages" that give it "an unfair advantage in the political marketplace." [109]

b. *Restrictions on contributions by nonresidents; AS 15.13.072(a), (e), (f)*

Alaska Statute 15.13.072 prohibits a candidate, group, or political party from soliciting or accepting contributions from nonresident individuals except to the extent that all the contributions received from nonresidents do not exceed specified limits.[110] It also prohibits a candidate from soliciting or accepting any contributions from a group which is organized under the laws of another state, which is resident in another state, or whose participants

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[109] *Austin*, 494 U.S. at 659.

[110] AS 15.13.072(a)(2) prohibits a candidate from soliciting or accepting a contribution from "an individual who is not a resident of the state at the time the contribution is made, except as provided in (e) of this section."

AS 15.13.072(e) permits a candidate to solicit and accept contributions from nonresident individuals if the amounts contributed by the nonresident individuals do not exceed: "(1) $20,000, if the candidate . . . is seeking the office of governor or lieutenant governor; (2) $5,000, if the candidate . . . is seeking the office of state senator; (3) $3,000, if the candidate . . . is seeking the office of state representative or municipal or other office."

AS 15.13.072(f) applies a ten-percent limitation on contributions by nonresident individuals to groups or political parties:

> A group or political party may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received.

are not Alaska residents when the contribution is made.[111] Consequently, nonresident individuals may make contributions to a candidate subject to the sliding limitations of AS 15.13.072(e) and to a group or political party subject to the ten-percent limitation of AS 15.13.072(f); nonresident groups may make no contributions at all. Nonresident individuals and groups may make unlimited independent expenditures.

These restrictions on the speech of nonresidents must meet the "narrowly tailored-compelling interest" test discussed in Part III.B. In justification, the State argues that these restrictions "prevent nonresidents from dominating the process," and that "[b]y restricting the influence of nonresidents . . . the reforms promote the valid state goal of encouraging voter participation in campaigns." The State refers us to no specific evidence of corruption or the appearance of corruption caused by out-of-state contributions, and does not contend that quid pro quo corruption justifies these restraints.

Applicable to this issue is the general evidence of the influence of money and political system corruption and appearance of corruption.[112] In addition, two former Alaska governors submitted affidavits in which they affied that contributions from outside the state create serious loyalty problems. Former Governor Walter Hickel stated that "whenever a candidate has to seek donations from outside the state, the candidate is buying a potential conflict of interest." Former Governor Jay Hammond stated that

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111 AS 15.13.072(a)(3) prohibits a candidate from soliciting or accepting a contribution from "a group organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made."

112 *See* Parts II, III.C.

> [t]he necessity of having to raise substantial sums of money from non-Alaska resident contributors discourages many qualified Alaskans from becoming candidates. And it taints those who do. How can the average Alaska voter believe that a candidate who has accepted thousands of dollars from non-Alaska resident contributors who have pecuniary interests at stake in the votes the candidate will cast if he or she is elected is not obligated to the contributors as much as he or she is to the voters? And there is an unfortunate basis in fact for that perception. Once elected, it is all too easy for candidates to accommodate mores to money, particularly since non-Alaska resident contributors do not ask the candidates that their money has helped to elect to act unlawfully, and most issues of public importance are rarely black and white. It is amazing how a flash of green can help clarify an ambiguous policy choice.

The State cites *O'Callaghan v. State*[113] and *Vote Choice, Inc. v. DiStefano*[114] in defense of the restrictions. But neither case certifies nonresident domination or enhanced voter participation as a compelling interest. *O'Callaghan* discusses a Wisconsin opinion holding that an interest in voter participation is compelling, but the United States Supreme Court reversed that ruling on other grounds.[115] *Vote Choice* portrays facilitated communication between the candidate and the electorate as only a

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[113] 914 P.2d 1250 (Alaska 1996).

[114] 4 F.3d 26 (1st Cir. 1993).

[115] *See O'Callaghan v. State*, 914 P.2d at 1257 (discussing *Wisconsin ex rel. LaFollette v. Democratic Party of United States*, 287 N.W.2d 519 (Wis. 1980), *rev'd sub nom., Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981)).

"valid" interest.[116] The Supreme Court has never held that fear of nonresident domination or a goal of enhanced voter participation is a compelling state interest justifying restraints on campaign finance.

AkCLU argues that absent "some evidence showing the corruptive influence of non-resident contributions, there can be no legitimate reason to preclude them from participating in the election process." It claims that these restraints are merely intended to "level the playing field," an insufficient justification. Because the contribution limits applicable to residents also apply to nonresidents,[117] AkCLU contends that the State must show special corruption caused by out-of-state contributions in order to uphold additional restrictions on nonresidents. It cites evidence discussing contributions by out-of-state groups as minimal, but the sources cited use a far less expansive definition for nonresidence than the statute, making the evidence an unreliable barometer of the statute's impact.

AkCLU relies on *VanNatta v. Keisling*.[118] The Ninth Circuit, applying a "less-than-strict, rigorous scrutiny," there struck down an Oregon constitutional amendment that restricted out-of-district contributions made to state candidates.[119] The Ninth Circuit unanimously held that the amendment was not closely drawn to advance the goal of reducing corruption because it banned all out-of-district donation, regardless of size.[120] But Judge Brunetti also concluded in his dissenting opinion that "Oregon has a

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116 *Vote Choice*, 4 F.3d at 39.

117 *See* AS 15.13.070.

118 151 F.3d 1215 (9th Cir. 1998).

119 *Id.* at 1220-21.

120 *See id.* at 1221.

sufficiently important interest in protecting its republican form of government," [121] reasoning that

> [i]f states have flexibility in determining who is a resident for voting purposes and in taking steps to make sure non-residents do not have access to some state services, it follows that states also have a strong interest in making sure that elections are decided by those who vote. The Supreme Court has come very close to saying as much in *Shaw*, *Holt*, and *Austin*. With the increasing importance of fund-raising in elections generally, . . . and in Oregon in particular, elections are for all intents and purposes are [sic] often decided well before any resident steps into a voting booth.[122]

Although Judge Brunetti's analysis is intriguing and we have recognized a similar theme in a different context,[123] we need not consider it here, because we think *VanNatta* is distinguishable on its facts. Oregon's out-of-district restrictions applied to both nonresidents and residents of

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121 *Id.* at 1222 (Brunetti, J., dissenting).

122 *Id.* at 1223 (Brunetti, J., dissenting).

123 In *Robison v. Francis*, 713 P.2d 259 (Alaska 1986), we noted that each state has the obligation "to preserve the basic conception of a political community," that this includes the "power to prescribe the qualifications of its officers and the manner in which they shall be chosen," and that this power and responsibility "applies not only to the qualifications of voters, but also to [the qualifications of various elected and unelected officers]." *Id.* at 270 n.14 (citing and quoting from *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). The state's power to preserve the political community by excluding nonresidents from voting is self-evident. Although we have not previously affirmed the authority of the state to limit the influence of nonresidents over state elections through regulation of their campaign contributions, such an extension would not be illogical.

Oregon.[124] But Alaska's challenged provisions apply only to nonresidents of Alaska, and do not limit speech of those most likely to be directly affected by the outcome of a campaign for state office—Alaska residents regardless of what district they live in. Also, Alaska is not contiguous to any other state, and the general state residence requirement does not have the same impact on nonresidents that Oregon's district-specific restrictions had.

Further, we respectfully disagree with the *VanNatta* court's discussion of "largeness," even though Alaska's restrictions do not directly distinguish based on the size of the individual contributions. Alaska's restrictions attempt "to ensure the integrity of political structures and processes."[125] They are aimed not at very large individual contributions, by which a single contributor can influence a candidate, but at cumulatively vast out-of-state contributions. *Austin* recognized this sort of corrupting influence.[126] Further, the limits here are closely drawn to achieve the goal of preventing non-resident contributors from drowning out the voices of Alaska residents. Though the State introduced evidence of the extent of what it called "out of state" contributions in recent elections, we are uncertain of the value of the State's evidence. The Act's limitation on nonresident groups applies, as noted above, to groups whose participants are not Alaska resi-

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[124] *See VanNatta*, 151 F.3d at 1217.

[125] *Id.* at 1225 (Brunetti, J., dissenting).

[126] *See Austin*, 494 U.S. at 660-61. AkCLU also cites *Whitmore v. Federal Election Comm'n*, 68 F.3d 1212 (9th Cir. 1996), which it describes as rejecting a California statute prohibiting out-of-state contributions. As Judge Brunetti in *VanNatta* concluded, "the *Whitmore* court did not intend to resolve the First Amendment rights of the contributors." *VanNatta*, 151 F.3d at 1225 (Brunetti, J., dissenting).

dents at the time of the contribution.[127] No records of sufficient specificity have been kept to show how many groups this might affect. We therefore conclude the record contains no evidence relating to the potential impact of this provision.

Alaska has a long history of both support from and exploitation by nonresident interests. Its beauty and resources have long been lightning rods for social, developmental, and environmental interests. More than 100 years of experience, stemming from days when Alaska was only a district and later a territory without an elected governor or voting representation in Congress, have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies for dealing with social or resource issues. Outside influence plays a legitimate part in Alaska politics, but it is not one that Alaskans embrace without reservation. The Act's restraints on nonresident contributions attempt to limit this influence, and attempt to prevent elected officials from becoming beholden to those influences. Through mass marketing and solicitations, organizations can marshal vast numbers of contributions by individuals. These nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by elections, Alaska residents. These restraints therefore limit the "potential for distortion." We hold that this is a sufficiently compelling state interest.[128]

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[127] *See* AS 15.13.072(a)(3).

[128] *See Austin*, 494 U.S. at 661.

Any question whether the dollar and percentage limits are unduly low turns on a "difference in kind" analysis, and we do not read the record to indicate that these limits in fact impinge on nonresidents' speech or associational rights.

AkCLU also objects to the "tracing rule" of AS 15.13.072(f), which states that contributions from "individuals who are not residents may not exceed 10 percent of total contributions" made to groups or political parties in a given year. AkCLU also asks that reporting requirements imposed on "non-resident" groups be invalidated for overbreadth. Because AkCLU's brief has devoted only five lines to these arguments, we decline to consider their merits. These provisions are not so obviously invalid that we will invalidate them based on the limited briefing before us.

c. *Ban on registered lobbyists' out-of-district contributions; AS 15.13.074(g)*

Alaska Statute 15.13.074(g) prohibits a registered lobbyist from contributing to legislative candidates in districts outside the district in which the lobbyist is eligible to vote.[129]

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[129] AS 15.13.074(g) reads:

> An individual required to register as a lobbyist under AS 24.45 may not make a contribution to a candidate for the legislature at any time the individual is subject to the registration requirement under AS 24.45 and for one year after the date of the individual's initial registration or its renewal. However, the individual may make a contribution under this section to a candidate for the legislature in a district in which the individual is eligible to vote or will be eligible to vote on the date of the election. An individual who is subject to the restrictions of this subsection shall report to the commission, on a form provided by the commission, each contribution made while required to register as a lobbyist under AS 24.45. This

The State contends that AS 15.13.074(g) reduces corruption and the appearance of corruption, and argues that lobbyists are like other persons whose contributions

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subsection does not apply to a representational lobbyist as defined in regulations of the commission.

AS 24.45.041 requires lobbyists to register before engaging in lobbying. AS 24.45.171(8) defines "lobbyist" to mean:

> (A) a person who is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through that person's agents with any public official for the purpose of influencing legislative or administrative action if a substantial or regular portion of the activities for which the person receives consideration is for the purpose of influencing legislative or administrative action; or
>
> (B) a person who represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation, or profession.

AS 24.45.161(a) exempts the following from registration:

> (1) an individual
>
> (A) who lobbies without payment of compensation or other consideration and makes no disbursement or expenditure for or on behalf of a public official to influence legislative or administrative action other than to pay the individual's reasonable personal travel and living expenses; and
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> (B) who limits lobbying activities to appearances before public sessions of the legislature, or its committees or subcommittees, or to public hearings or other public proceedings of state agencies;
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> (2) an elected or appointed state or municipal public officer or an employee of the state or a municipality acting in an official capacity or within the scope of employment;
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> (3) any newspaper or other periodical of general circulation, book publisher, radio or television station (including an individual who owns, publishes, or is employed by that newspaper or periodical, radio or television station) that publishes news items, editorials, or other comments, or paid advertisements, that directly or indirectly urge legislative or administrative action if the newspaper, periodical, book publisher, radio or television station, or individual engages in no further or other activities in connection with urging or advocating legislative or administrative action other than to appear before public

create "special risks" of actual or apparent corruption. It asserts that "greater risks of corruption attend lobbyists' special relationship with elected officials."

AkCLU counters that the State has not demonstrated what real harm is alleviated by the restriction and that the $500 individual contribution limit already prevents "large" contributions that could corrupt. It claims the ban violates free speech. (The heading in AkCLU's brief also asserts that this ban violates lobbyists' rights to equal protection but because AkCLU has not briefed this contention, we do not reach it.)

The State introduced evidence, through affidavits and a survey commissioned by the state senate, of perceptions of the role lobbyists play in political fund-raising. According to the survey, fifty percent of registered lobbyists believe fund-raising pressure by special interests is a "serious problem," because monied interests get special access to and influence over legislators.

Eighty-seven percent of lobbyists said that the refusal to make campaign contributions sometimes adversely affects lobbying. Thirty-seven percent said that this happens frequently and that lobbyists often give contributions "defensive[ly] to ward off negative reactions and the loss of access."

The State submitted an Anchorage Daily News (ADN) article, attached to the Frank affidavit, about one lobbyist's settlement of campaign finance law violations. Frank's affidavit also attached another article from an un-

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sessions of the legislature, or its committees or subcommittees, or public hearings or other public proceedings of state agencies;

(4) a person who appears before the legislature or either house, or standing, special, or interim committee, in response to an invitation issued under (c) of this section.

specified national journal comparing lobbyist contributions to bribery of judges.

David Finkelstein affied that lobbyists serve as conduits for the clients they serve. He stated that "the clear message" lobbyists gave him as a legislator was that "I was expected to give them special consideration." He recalled that large contributors had an effect on some of his early votes.

The State also discussed APOC records that imply that substantial risks of actual or perceived corruption attend lobbyists' special relationship with elected officials. The records concerned questionable financial relations between legislators and lobbyists, including informal loan arrangements and unreported lobbyist payment of air travel costs.

This evidence supports the State's assertion that lobbyists' contributions are "especially susceptible to creating an appearance of corruption." The State argues:

> When in session, Alaska's legislature is geographically isolated from the state's core population. Lobbyists are, by definition, paid to influence administrative or legislative action. AS 24.45.171(8). Their professional purpose, coupled with their proximity to legislators during the legislative session, makes them particularly susceptible to the perception that they are *buying* access when they make contributions.

Based on this evidence we conclude that the State had a compelling interest justifying some restraint on speech.

The next question is whether the challenged ban is narrowly tailored to serve the purpose of preventing actual or perceived corruption. Unlike most individuals, who are unlikely to have any incentive to contribute to many of the candidates for the fifty legislative seats at issue each

general election,[130] a lobbyist has some incentive to contribute to candidates whose election will place them in a position to introduce or thwart legislation and to vote in committee or on the floor on matters of professional interest to the lobbyist.

The cumulative effect of numerous $500 contributions by a single lobbyist is substantial. By virtue of the lobbyist's special role in the legislative system, his or her broad distribution of campaign money creates a very real perception of influence-buying. The diffusion of cash is all the more dangerous because it has the potential to achieve influence with a significant portion of sitting legislators. For example, in the 1990 election cycle, fifty-one lobbyists made 485 contributions averaging $433 each, for a total of $210,047. Seventy-six candidates received these contributions. Perhaps other alternatives would have been effective in carrying out the State's purpose, but the out-of-district ban draws a logical compromise between lobbyists' private rights and their professional obligations.

We also conclude that the restraint does not foreclose lobbyists from engaging in political speech. As the State notes, lobbyists retain other contribution avenues. For example, "[they] may also participate in and contribute to 'groups'—including political parties—which may contribute to any legislative candidate." And they may make independent expenditures for any legislative candidate.

Other courts have imposed campaign speech restrictions on individuals based on their professions. The Vermont Supreme Court, for example, upheld a lobbyist speech restriction four years ago in *Kimbell v. Hooper*.[131] There the court rejected a challenge to a Vermont statute that pro-

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[130] Alaska Const. art. II, §§ 1, 3.

[131] 665 A.2d 44 (Vt. 1995).

hibited contributions by registered lobbyists to legislators while the legislature is in session.[132] The court concluded that "[t]he legislature has chosen a narrowly drawn measure to avoid a serious appearance of impropriety, and we see no reason to strike that measure down."[133] In our view, lobbyists are similar to those professionals whose contribution rights have been permissibly restricted by federal and state law, because their contributions create special risks of actual or apparent corruption.[134]

While the State may not "burden substantially more speech than is necessary to further the government's legitimate interests,"[135] we conclude that the ban on out-of-district lobbyist contributions is narrowly tailored to further the State's compelling interest. We therefore uphold the ban on out-of-district contributions by lobbyists.

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[132] *See id.* at 46 n.2, 51.

[133] *Id.* at 51.

[134] *See Blount v. Securities & Exchange Comm'n*, 61 F.3d 938, 941-48 (D.C. Cir. 1995) (upholding regulation restricting ability of municipal securities professionals to contribute to or solicit contributions for political campaigns of elected officials from whom they may obtain business); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 66-69 (Ill. 1976) (upholding ban on contributions from liquor licensees); *Soto v. New Jersey*, 565 A.2d 1088, 1105-06 (N.J. Super. App. Div. 1989) (upholding ban on campaign contributions by key casino employees). We decline to follow *Fair Political Practices Comm'n v. Superior Ct. of L.A. County*, 599 P.2d 46, 51-53 (Cal. 1979), which struck down bans on lobbyists' contributions. The law in *Fair Political Practices Commission* banned all contributions by lobbyists, and was therefore not narrowly tailored. *See id.* Here, by contrast, lobbyists may still participate in the campaign process by contributing to candidates from their own districts. *See* AS 15.13.074(g).

[135] *See California Prolife Council v. Scully*, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

2. *Contribution limits*

The Supreme Court has encapsulated the problem of judging contribution limits: " 'if it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as a $1,000.' Such distinctions in degree become significant only when they can be said to amount to *differences in kind.*" [136] Another court observed that "every jurisdiction is *sui generis*, and thus every campaign contribution limitation must be judged on its own circumstances." [137]

In addition to the evidence discussed in Parts II and III.C, the State submitted evidence directly relating to the influence of large contributions.

According to the Josephson Report survey, only eight percent of lobbyists said no legislator can be influenced by campaign contributions to take or withhold some significant legislative action. Forty-seven percent said at least a quarter of the legislature could be so influenced.

Michael Frank attached to his affidavit copies of newspaper articles and columns to support his contention that people are generally "fed up" with the corruption of the system as it currently stands. These include: (1) an ADN editorial pointing out the conflicts of interest on a tax issue faced by legislators who received money from the oil industry. "It's absurd to believe that any legislator can receive thousands of dollars from mighty contributors and remain totally unaffected by it," the editorial argues; (2) an ADN article about the proposed initiative, quoting lobbyist Jerry Reinwand as saying "I can't imagine any-

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[136] *Buckley*, 424 U.S. at 30 (emphasis added) (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)).

[137] *California Prolife Council*, 989 F. Supp. at 1298.

thing more distasteful than the system we have now." The article also quotes AKPIRG director Stephen Conn as criticizing the system for making politicians beholden to large contributors, and as saying "[t]he game seems rigged right from the beginning"; (3) an ADN editorial column by Howard Weaver articulating the view that "[a]s the price of politics gets higher, politicians are necessarily forced to pay more attention to those who can give them money"; (4) an ADN editorial criticizing a state senator who had dismissed the public concern that contributions taint state politics as "a great paranoid myth." The editorial mocked the senator's statement as patently false; (5) an ADN column by Mike Doogan implying that Governor Tony Knowles's stance on some issues is governed by the fact that British Petroleum was a large contributor to Knowles's political party, the Democratic Party; and (6) an ADN article quoting David Finkelstein as saying, "It's obvious that much of what goes on is buying influence, not influencing elections."

Some of the evidence implies that campaign contributions actually corrupt. Larry Makinson's *Open Secrets* strongly implies that an immense infusion of oil money into the Republican Party in 1986 brought about the demise of a North Slope tax proposal that would have cost oil companies $100 million.[138]

An AKPIRG report postulated in 1995 that candidates considered election funding when passing bills that exempted cruise lines from gambling and alcohol taxes, exempted price-setting commercial fishermen from antitrust laws, repealed seafood processing quality assurance plans, reduced oil royalties payable to the state, and "slashed funding for consumer protection and antitrust

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[138] *See* Larry Makinson, *Open Secrets* 20 (1987).

cases." [139] The report author asserted that "only the most naive would miss the connection between large contributions and protection of interests." [140]

Former Alaska Governor Steve Cowper affied that he believes the current state of campaign finance breeds "cynicism and distrust." "[T]here is very little practical difference," Cowper affied, "between a large campaign contribution and a bribe." He further stated that the public "generally understands that campaign contributions are an important factor taken into consideration by elected officials in every vote taken or decision made."

Former Alaska Governor Jay Hammond described an unusual position he faced in his first senate term. Having accepted money from oil interests, he felt compelled to vote against them just to show he had not been bought. He ultimately voted against "Big Oil," and "[a]lthough I like to think that I cast those votes based on the merits of each bill," he said, "to this day I am not sure of my true motivation."

David Finkelstein affied that while he resisted the influence of big contributors on major bills, "I do recall that large contributors had an effect on my vote" on some minor bills.

Charles Wohlforth, a member of the Anchorage Municipal Assembly, affied that

> . . . I have at times found it impossible to dissect my own motives in voting on complex issues with conflicting and incomplete information and faced by advocacy from important contributors to my cam-

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139 Alaska Public Interest Research Group, *The Best Politicians Money Can Buy* 9 (1995).

140 *Id.*

> paigns. Despite my best efforts and particular concern about campaign finance reform I cannot with complete confidence say I have never been influenced by campaign contributions.
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> . . . I have developed the belief and the working assumption that campaign contributions received and the prospect of receiving future contributions often affects the outcome of Assembly votes.

We conclude that the State's evidence demonstrated that there is a legitimate concern about corruption or the appearance of corruption, and the potential for resulting erosion of public confidence in the electoral process. This evidence established the existence of a compelling governmental interest justifying some restrictions on local and state election campaign contributions. The question is whether the contribution limits adopted in SB 191 are narrowly tailored or whether they unconstitutionally prevent "effective advocacy" [141] or represent "differences in kind." [142]

a. *Limits on individuals' contributions; AS 15.13.070(b)*

Individuals are prohibited by AS 15.13.070(b) from contributing more than $500 per year to a candidate or to a "group" that is not a political party, and from contributing more than $5,000 per year to a political party.[143]

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141 *Buckley*, 424 U.S. at 21.

142 *Id.* at 30.

143 Following repeal and re-enactment of AS 15.13.070 by ch. 48 § 10, SLA 1996, AS 15.13.070(b) provides: "An individual may contribute not more than (1) $500 per year to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party; (2) $5,000 per year to a political party."

Prior to 1996, Alaska's individual contribution limit was $1,000 per year.[144]

The State defends these limits as necessary to "avoid the risks of corruption and its appearance that large contributions create, without interfering with the expressive and associational aspects of contributing." The State acknowledges that to be held valid, the limits cannot undermine "robust and effective" public debate and must withstand strict scrutiny.

The State argues that federal law requires that each jurisdiction's restrictions be judged based on the applicable context.[145] The State contends that deference to legislative determinations is the general practice in such cases. It relies on documents it filed in the superior court as proof that the total amount contributed to candidates under the reforms has not declined from pre-reform totals. The State would justify the limits on contributions to groups and political parties as preventing backdoor evasion of the candidate contribution limits.

AkCLU, on the other hand, argues that the $500 limit per candidate is too sweeping, and insufficiently justified. It argues that the initial limits authorized in *Buckley* were intended to prevent "the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption had been identified."[146] Not only are these limits lower than needed to prevent corruption, AkCLU contends, but the State has failed to demonstrate "real harm" caused by contributions in the $500 to $1,000 range, given that the pre-reform limit was $1,000.

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[144] *See* former AS 15.13.070 (1995).

[145] *See California Prolife Council*, 989 F. Supp. at 1298.

[146] *Buckley*, 424 U.S. at 28.

AkCLU contends that the restriction merits no deference to the legislature, given the high cost of elections in Alaska, and the fact that, after adjustment for inflation, the Alaska limit is only eight percent of the limit approved in *Buckley* in 1976. According to AkCLU, the restriction is an impermissible "difference in kind."

AkCLU also argues that the State's restrictions on contributions to political parties are unnecessary and not narrowly tailored. AkCLU contends that the State offers no evidence of backdoor violations of the current limit, and that existing law, by prohibiting laundering, already closes such loopholes.

In support of its cross-summary judgment motion, the State introduced evidence to show that the reforms would not impede the ability of candidates to run successful campaigns.

Robert Stern, of the Center for Governmental Studies, examined past contributions and made predictions about the effects of reform. He predicted that contributions would drop, but not so much as to place a "substantial burden" on candidates. He determined that house candidates would need only ninety-four contributions of $500 to reach the median total successful candidates raised for the 1990-96 elections. Following Stern's statistics, senate candidates would require only 185 contributions of $500 each to reach the median total successful candidates raised for the 1990-96 elections. Likewise, candidates for governor would need only 2,448 contributions of $500 to reach the median total successful candidates reached during the 1990-94 elections. Stern predicted that the off-year ban would impact incumbents more than challengers. And he predicted that the ban on inter-candidate transfers would have minimal effects.

Nadine Hargesheimer, a campaign staffer for two Fairbanks mayoral candidates, affied that the reforms "did not materially affect Mayor Hove's ability to raise enough money to run an effective campaign" for that office in 1997. Despite the fact that there were three fewer mayoral candidates in 1997, the amount raised in that race was in fact about ten percent more than the $148,228 candidates raised in 1991.

Harriet Drummond, a member of the Anchorage School Board, affied that the reforms "had no substantial impact on my fundraising" in her 1997 campaign for re-election.

Thomas Begich, a campaign consultant, affied that no specific amount of money is required to run a viable campaign; he stated that "I believe it is clear that competitive campaigns can be run in Alaska under the present campaign finance reform law." He added that "while a campaign's competitiveness does not appear to be affected" by the reforms' restrictions, "the proportional impact of an individual's influence on the election process over that of a non-individual (PAC, business or labor union) has increased."

AkCLU opposed this evidence in the summary judgment proceeding with one affidavit. James Lottsfeldt, an advertising firm account manager, affied that the reforms "will so severely limit the available resources to candidates that, except in unusual circumstances, the limitations will materially impair a candidate's ability to conduct an effective campaign." Such a system will, Lottsfeldt stated, benefit individuals with enough private wealth to campaign without contributions.

To support its motion for a preliminary injunction, AkCLU submitted two other affidavits.

Tom McKay, Chairman of the Republican Party of Alaska, affied that the Act "substantially impairs the Republican Party's ability to raise sufficient funds to support its activities." He cited a drop in fundraising from $362,525 in 1995 to $119,917 in 1997 (both non-election years).

Gary Jacobson, a professor of political science at the University of California, San Diego, disputed the relevance of the Drummond and Hargesheimer affidavits. He maintained that analyses of effects based on municipal election data are not valid for elections to the state legislature.

Both sides cite case law to support their contentions. So far as we are aware, no court has invalidated individual-to-candidate contribution limits similar to those at issue here on the ground they are per se unconstitutional.[147] Rather, the Supreme Court upheld as a matter of law a $5,000 limit on individuals' contributions to multicandidate political committees.[148] And in *Buckley*, it upheld the FECA $1,000 limit on individuals' contributions to candidates, even though the FECA also imposed a $25,000 cumulative annual limit on an individual's contributions.[149] The Sixth Circuit affirmed a grant of summary judgment approving a $1,000 limit on contributions by individuals to a single candidate in an elec-

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147 *Cf.* William J. Connolly, *How Low Can You Go?: State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. Rev. 483, 484 (1996) ("As a general proposition, contribution limits are not *per se* unconstitutional."); *Arkansas Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540 (W.D. Ark. 1998) (invalidating a $500 state limit on contributions to committees that could make only "independent expenditures").

148 *See California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 198-201 (1981).

149 *See Buckley*, 424 U.S. at 7, 35.

tion year.[150] The Eighth Circuit invalidated a $100 contribution limit on the basis of undisputed facts that indicated the limit was too low to allow meaningful political speech in campaigns.[151] The Oregon Supreme Court invalidated a $500 limit on individual campaign contributions because the legislation did not specify any harm it was intended to fix.[152]

Other courts, examining contribution limits following trial, have considered a variety of factors to determine whether a particular limit is constitutionally permissible. In *Carver v. Nixon*, the Eighth Circuit considered multiple quantitative factors—including the cost of elections and the percentages of small-contribution donors—to find that the $100-$300 limits there in issue were invalid because they entailed a "difference in kind."[153] In *National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*, the court invalidated $100 and $50 limits as too restrictive of candidate speech after a full trial.[154]

In *Montana Right to Life Ass'n v. Eddleman*, the district court held that "a determination of what constitutes a 'large' contribution associated with campaign corruption or the appearance of corruption is based upon the particular facts and circumstances of the campaign at issue."[155]

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150 *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir. 1997).

151 *See Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994).

152 *See VanNatta*, 931 P.2d at 784-87.

153 *Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995).

154 *See National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics*, 924 F. Supp. 270, 273, 282 (D.D.C. 1996), *vacated on other grounds*, 108 F.3d 346 (D.C. Cir. 1997).

155 *Montana Right to Life Ass'n v. Eddleman*, 999 F. Supp. 1380, 1386 (D. Mont. 1998).

The same sentiment was expressed in *California Prolife Council v. Scully*, where the district court held that "[t]he facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent provisions of the various statutes and ordinances undermines the value of crude comparisons." [156]

(1) *Individual contributions to candidates*

The affidavits and other documents filed by the State in the superior court support a finding that the contribution limits do not place a substantial burden on the ability of candidates to run competitive local or state election campaigns. The opinions of the State's experts also support that conclusion. Facts adduced by the State memorializing experience in local and statewide races support the experts' opinions. The excerpt contains a summary of candidates' disclosure statements indicating that the total amount of contributions has not declined significantly since enactment of SB 191. The record suggests that the contribution totals for 1998, the first election year after the reforms took effect, exceed the comparable 1996 campaign totals.

As we noted above, AkCLU offered two affidavits to support its injunction request and one to support its summary judgment argument. They generally assert that the Act's provisions impair fund-raising and advocacy, but do not explain the impact of particular provisions of the Act, including these contribution limits. Nor do they discuss the effect of the two temporal limitations that we hold to be invalid in Part III.D.3. Even standing alone, the affidavits would not support findings that the contribution limits are different in kind than Alaska's preexisting

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156 *California Prolife Council*, 989 F. Supp. at 1298.

$1,000 limit or the limit the Supreme Court approved in *Buckley*, or are any lower than the lowest limit the Supreme Court would approve for state election campaigns. *Buckley* did not hold that $1,000 was the lowest individual contribution limit that would be consistent with the First Amendment.[157] Moreover, *Buckley* dealt only with the FECA, which governs campaigns for federal office.[158] It is not apparent that a campaign for local or state elected office is as complex or potentially expensive (given the numbers of voters involved) as a campaign for the federal offices of president, vice-president, senator, or representative. *Buckley* did not intimate that a limit of $1,000 was the lowest limit permissible for state elections. Nor can the Act's provisions be readily compared with FECA's. Some provisions have no counterpart. FECA, for example, imposes a $25,000 cumulative annual limit on individual contributors,[159] intuitively lessening a justification for a federal candidate limit lower than $1,000.

Other courts have noted that it is important to look to the circumstances of the elections to determine what limitations are and are not constitutionally permissible. But absent evidence that diminished contribution limits have impaired effective advocacy or are qualitatively different in kind, we see no justification for a trial. The United States Supreme Court has made it clear that a court is not to substitute its judgment for the legislature's by wielding a scalpel the legislature chose to forego. That the legislature may not have "fine-tuned" the Act does not justify its invalidation. The evidence the State introduced is, we find, sufficiently compelling to justify the $500

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157 *See Day*, 34 F.3d at 1366.

158 *See id.*

159 *See* 2 U.S.C. § 441a(a)(3).

limitation on individual contributions for electoral campaigns in Alaska. We therefore uphold the limitation.

In doing so, we necessarily reject AkCLU's arguments that the new limits do not address the real danger: "large" contributions. The Supreme Court rejected a similar argument in *Buckley*.[160] We also reject AkCLU's argument that, because the new limits fail to recognize the high cost of Alaska elections and are, when adjusted for inflation, only eight percent of the limit approved in *Buckley* in 1976, the new limits are invalid as a matter of law. The Supreme Court has not held contribution limits to be invalid on a theory that they fail to keep pace with inflation.

(2) *Individual contributions to groups and political parties*

The State argues that limits on individuals' contributions to groups and political parties are also reasonable and that such limits are necessary to protect the "integrity" of the limit on individuals' contributions to candidates by closing loopholes. We conclude that preventing individuals from channeling their contributions through a group or a party, and thus avoiding the limit on individuals' contributions to candidates, is a valid purpose. We also conclude that the $5,000 limit is not so patently "different in kind" as to justify invalidation. We uphold the limit on individual contributions to groups or political parties, keeping in mind the Court's words in *Buckley*: "If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000."[161]

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[160] *See* 424 U.S. at 30.

[161] 424 U.S. at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)).

b. *Limits on contributions by groups; AS 15.13.070(c)*

Under AS 15.13.070(c), a "group" that is not a political party may not contribute more than $1,000 per year to a candidate, another group, or a political party.[162]

The State's evidence with respect to large contributions discussed above (*see supra* Part III.D.2) also applies to "group" contributions. AkCLU contends that groups' contributions merit greater protection because they implicate both associational and speech rights. It asserts that contributions not made by an individual to a candidate have no quid pro quo effect, and that backdoor funneling concerns are irrelevant because existing law already prohibited funneling excess contributions through a group. It also claims that the $1,000 limits are significantly lower than the $5,000 group limit approved in *Buckley*, and are so low that they prohibit contributions that no longer threaten corruption.

It appears to us, however, that this $1,000 limit cannot be said to be different in kind. *Buckley* actually upheld individual contribution limits of $1,000 per election for federal elections, subject to a cumulative annual maximum of $25,000.[163] And even though funneling was already illegal in Alaska, there is no indication that existing law was either an adequate protection or effectively enforceable, and there was instead evidence it was not.[164]

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[162] AS 15.13.070(c) provides: "A group that is not a political party may contribute not more than $1,000 per year (1) to a candidate, or to an individual who conducts a write-in campaign as a candidate; or (2) to another group or to a political party."

[163] *See* 424 U.S. at 7, 28-29.

[164] David Finkelstein affied that during his tenure with the House Democratic Campaign Committee,

> [n]early all the money came from large contributors who had already given the maximum amount in many races and wanted

Because the question is ultimately whether these limits are "large," prevent "effective advocacy," or constitute a "difference in kind," our comments relative to the individual contribution limits apply equally here. We consequently reverse the grant of summary judgment with respect to these limits and uphold this provision of the Act.

c. *Limits on contributions by political parties: AS 15.13.070(d)*

The Act sets graduated limits for political parties' contributions to candidates; they range from $100,000 to candidates for governor or lieutenant governor to $5,000 to candidates for certain other offices.[165]

The State argues that these limits are necessary to prevent groups and individuals from circumventing their contribution limits by funneling contributions through political parties; in support it cites APOC inquiries regard-

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to see additional money (beyond the limits of the law) go to these candidates. In a number of cases business interests went even further and attempted to direct their contributions as pass-throughs to specific candidates.

[165] AS 15.13.070(d) provides:

A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed

(1) $100,000 per year, if the election is for governor or lieutenant governor;

(2) $15,000 per year, if the election is for the state senate;

(3) $10,000 per year, if the election is for the state house of representatives; and

(4) $5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

ing use of political parties to pass funds to candidates. The State also introduced an affidavit from former Alaska Governor Steve Cowper, who affied that pass-throughs (donations to a party that are earmarked for a candidate) under the pre-reform system "made a mockery of contribution limits and turned political parties into money launderers."

Relying on *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*,[166] AkCLU argues that all limits on political parties' campaign finance activities are unconstitutional. It concludes that a majority of the Court there stated its belief that contributions or coordinated expenditures made by a political party do not have a corrupting impact on the political process.

But, because *Colorado Republican* addresses limits on parties' independent expenditures, not contributions, it does not squarely apply here. As noted above, the Court has held that expenditure limits infringe much more directly on speech than do contribution limits. Further, the Court primarily analyzes contribution limits in context of associational rights. A party's associational rights are not unduly infringed by contribution limits that are not different in kind. We are not prepared to say, based on the record before us, that these limits are different in kind.

We note that federal law contains equivalent limits. Under FECA, a political party is categorized as a "multicandidate political committee."[167] 2 U.S.C. § 441a imposes the following limits on contributions by multicandidate political committees: (a) $15,000 per year to a

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[166] 518 U.S. 604 (1996).

[167] *See* 2 U.S.C. § 431.

political party,[168] (b) $5,000 per year to non-party multicandidate political committees,[169] and (c) $5,000 per election to candidates for federal office.[170] National parties and party senate campaign committees may give up to $17,500 to senate candidates during an election year.[171]

Another provision treats parties differently for purposes of expenditures, but it does not affect the contribution limits to which parties are otherwise subject.[172]

Absent any limits on contributions by parties, we believe there would be substantial potential for undue influence, i.e., quid pro quo corruption or the appearance of corruption. The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself. The relatively large ($5,000) limits on contributions by individuals to parties would also encourage channeling individual contributions to favored candidates absent any party limits. We therefore conclude that the State has a legitimate governmental interest in limiting a party's contributions. Further, to the extent the ban on "non-group" contributions may be invalid, limits on party contributions become even more justified. We therefore reverse the judgment below with respect to AS 15.13.070(d) and uphold the limit on contributions by political parties.

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168 *See* 2 U.S.C. § 441a(a)(2)(B). *But see* 2 U.S.C. § 441a(a)(4) ("The limitations on contributions contained in [paragraph 2] do not apply to transfers between and among political committees which are national, State, district, or local committees . . . of the same political party.").

169 *See* 2 U.S.C. § 441a(a)(2)(C).

170 *See* 2 U.S.C. § 441a(a)(2)(A).

171 *See* 2 U.S.C. § 441a(h).

172 *See* 2 U.S.C. § 441a(d).

3. *Restrictions on when contributions may be made and received*

a. *Bans on nonelection year contributions; AS 15.13.074(c), (d)*

Two statutes which restrict the timing of contributions effectively ban "non-election year" contributions. Alaska Statute 15.13.074(c)(1) limits pre-election contributions. For candidates for offices filled at general elections, the statute prohibits making contributions before January 1 of the election year.[173] For candidates for offices filled at

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[173] AS 15.13.074(c), though amended in 1998, reads largely as it did in the 1996 Act. *Compare* ch. 48 § 11, SLA 1996 *with* ch. 74 § 5, SLA 1998. The 1996 Act provides:

> A person or group may not make a contribution (1) to a candidate for governor or lieutenant governor or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for governor or lieutenant governor, before the later of the following dates:
>
> (A) the date the individual
>
> (i) becomes a candidate; or
>
> (ii) files with the commission the document necessary to permit the individual to incur certain election-related expenses as authorized by AS 15.13.100; or
>
> (B) January 1 of the year of the election . . . .
>
> . . . .
>
> (2) to a candidate for the state legislature or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for the state legislature while the legislature is convened in a regular or special legislative session, unless the contribution is made in a place other than the capital city during the 90 days immediately preceding an election in which the candidate or individual is a candidate, or before the later of the following dates:
>
> (A) the date the individual
>
> (i) becomes a candidate; or
>
> (ii) files with the commission the document necessary to permit the individual to incur certain election-related expenses as authorized by AS 15.13.100; or

municipal or special elections, it prohibits making contributions earlier than nine months before the election.[174] Alaska Statute 15.13.074(c)(4), as amended in 1998, bars post-election contributions, i.e., after December 31 of the election year or sixty days after the candidate's last contested election, whichever comes first.[175] Alaska Stat-

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(B) January 1 of the year of the election;

(3) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for an office that is to be filled at a municipal election before the later of the following dates:

(A) the date the individual

(i) becomes a candidate; or

(ii) files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100;

(B) the date that is nine months before the date of the municipal election; or

(4) to any candidate after the earlier of December 31 of the year of the election or the 60th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election;

(5) in the capital city to a candidate for governor or lieutenant governor or the state legislature when the legislature is convened in a regular or special legislative session.

AS 15.13.074(c) (1996).

[174] *See* AS 15.13.074(c)(3)(B).

[175] *See* AS 15.13.074(c)(4), as amended by ch. 74 § 5, SLA 1998. Before its amendment in 1998, AS 15.13.074(c)(4) imposed a post-election cutoff of forty-five days. *See* ch. 48 § 11, SLA 1996.

ute 15.13.072(c) correspondingly restricts when contributions may be solicited or accepted.[176] The Act also contains contingent timing restrictions that take effect only if a final court order declares AS 15.13.074(c) unconstitutional.[177]

At the outset, we note that *Buckley* authorizes "reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication," provided that the regulations do not impose *direct* quantity restrictions on political communication and association.[178]

The State offered evidence bearing on the need for contribution time limits. In *Open Secrets*, author Larry Makinson argues that off-year contributions allow donors effectively to double the existing contribution limits by giving twice in a single election cycle.[179]

In 1989 the APOC staff examined the proportion of contributions made after elections.[180] Less than two percent of all contributions in the 1988 cycle were post-

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[176] AS 15.13.072(c) provides:

> (c) An individual, or one acting directly or indirectly on behalf of that individual, may not solicit or accept a contribution
>
> (1) before the date for which contributions may be made as determined under AS 15.13.074(c); or
>
> (2) later than the day after which contributions may not be made as determined under AS 15.13.074(c).

[177] *See* ch. 48 § 33(b), SLA 1996.

[178] 424 U.S. at 18.

[179] *See* Larry Makinson, *Open Secrets* 6 (1987).

[180] *See* Alaska Public Offices Commission, *Impact of Reform Proposals on Campaign Funding Patterns in Alaska* (1989).

election contributions.[181] At that time a majority of the APOC commissioners stated strong support for barring post-election contributions, and hoped such a ban would curtail contributions "intended to influence a successful candidate rather than the outcome of an election." [182]

Former Alaska Governor Hickel affied that "post-election contributions can too easily be viewed as an attempt to purchase influence and are one of the most troubling kinds of contribution."

The State submitted a news article quoting 1994 gubernatorial candidate Jim Campbell as saying that "[t]here is an appearance of conflict of interest when a winning candidate raises money after the election is over."

In the superior court the State argued that the timing limits "address the problem of the perpetual campaign." It argues on appeal that these restrictions help ensure that contributions will be used only to finance election campaigns. It asserts that contributions "remote in time" to an election are "very susceptible to the appearance that they were made to purchase influence." It contends that APOC reports demonstrate the need for fund-raising time limits. These reports show that between 1989 and 1995, eighty percent of all nonelection-year contributions were made directly to incumbents. Only three percent of nonelection-year contributions were directed to challengers. Candidates for seats with no incumbent candidate received seventeen percent of nonelection-year contributions.

The State claims that the pre-election year ban—"before candidates are declared and platform issues are identified"—eliminates contributions that have "the ap-

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181 *See id.*

182 *APOC Ann. Rep. to the Legislature* 10 (1989).

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pearance of being made to purchase access or influence, particularly if the candidate . . . is an incumbent."

The evidence the State cites shows, at most, that incumbents who received pre-election year contributions may have had a fund-raising advantage over the challengers, but it does not distinguish on the basis of when the incumbents and challengers declared their candidates, or rebut the possibility that incumbents, whom voters had previously favored, and whose political platform was previously successful, were more in tune with the electorate or better organized than their challengers.

That pre-election year contributors strongly favored incumbents may imply a desire by those contributors to purchase access or influence. But it does not give the appearance of corruption absent some evidence implying that incumbents have used pre-election year contributions to help raise funds substantially exceeding their probable campaign needs. Nor is it apparent how the temporal limits address any corruption that might arise from giving some contributors inordinate opportunity to influence the process.[183]

The State emphasizes the negative public perception of *post-election* contributions:

> Obviously a postelection contribution cannot be intended to assist the candidate in his or her efforts to win because the election is over. While some contributors may simply wish to assist in retiring campaign debts, a more likely perception is that the purpose is to buy influence or, at the very least, access.

To bolster its argument, the State cites cases from other jurisdictions with what it admits are "mixed re-

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183 *Cf. Austin*, 494 U.S. at 658-61 (recognizing danger of "corrosive and distorting effects of immense aggregations of wealth").

sults." In two cases, courts upheld the restrictions.[184] In *Gable v. Patton*, the restriction barred acceptance of contributions during the four weeks preceding a primary.[185] In *Ferre v. Florida ex rel. Reno*, the restriction prohibited post-election contributions.[186] In the other two cases (both involving off-year bans), courts held the time restrictions unconstitutional.[187]

AkCLU argues that the State has failed to provide evidence of "real harm." Likewise, AkCLU maintains that "[t]he identified harm of a *quid pro quo* receipt of money in exchange for political favors simply does not apply to non-incumbents." It asserts that, if anything, the evidence suggests the aggregate effect of the temporal limits would be to increase, not diminish, the possibility of corruption.

It also contends that the limits are not narrowly tailored, and that even though the contingent temporal restrictions reduce the harm, they unconstitutionally interfere with the right of association.

While we recognize that these limits would have a significant effect on a candidate's power to spend money during non-election years, we consider these provisions to be contribution limits, not expenditure limits.[188] It is not apparent how the relatively short pre-election contribution

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184 *See Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998); *Ferre v. Florida ex rel. Reno*, 478 So. 2d 1077 (Fla. Dist. App. 1985).

185 *See* 142 F.3d at 944.

186 *See* 478 So. 2d at 1078-79.

187 *See Zeller v. Florida Bar*, 909 F. Supp. 1518 (N.D. Fla. 1995); *Opinion of the Justices to the House of Representatives*, 637 N.E.2d 213 (Mass. 1994).

188 Until contributions are received, they are unavailable to expend. *But see Opinion of the Justices*, 637 N.E.2d at 217.

window addresses corruption or the appearance of corruption. Neither the minimal evidence nor the State's arguments justify the compressed time limits of AS 15.13.074(c)(1), (2), and (3). The cases the State cites do not explain how the pre-election limits can be justified.[189] We agree with the core rationale of the Massachusetts Supreme Judicial Court, which concluded in *Opinion of the Justices to the House of Representatives* that a cap on nonelection-year contributions was unconstitutional.[190] That court held:

> [L]egislation that has the effect of prohibiting a contributor from expressing support and affiliation with a candidate for a lengthy period constitutes a significant interference with the right of association. A contributor might have compelling reasons for desiring to express that support at a particular time other than the year of the election.[191]

We therefore affirm the superior court's invalidation of the pre-election contribution limits of AS 15.13.074(c)(1), (2), and (3).

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189 *See Gable*, 143 F.3d at 949-53 (upholding restriction that prohibited acceptance of contributions from outside sources during the twenty-eight days preceding an election, and that was part of a scheme for publically financing election campaigns); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1318-21 (9th Cir. 1992) (striking down fiscal year limit on campaign fund-raising because it discriminated against challengers).

The State also cites *Ferre*. But that decision upheld restrictions on post-election contributions, and it does not address the sort of pre-election restrictions challenged here.

Zeller, 909 F. Supp. at 1525-26 (holding unconstitutional prohibition on contributions made more than one year before judicial elections).

190 *See Opinion of the Justices*, 637 N.E.2d at 218.

191 *Id.* at 218.

Our affirmance of this aspect of the judgment below causes the eighteen-month contingent pre-election time limits in the Act to take effect.[192] Because neither side has substantively discussed the validity of these contingent limits, and because they are not patently unconstitutional, we decline to address their validity here.[193]

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192 *See* ch. 48 § 12, SLA 1996:

AS 15.13.074(c) is repealed and reenacted to read:

A person or group may not make a contribution (1) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 when the office is to be filled at a general election before the date that is 18 months before the general election;

(2) to a candidate or an individual who files with the commission the document necessary to permit that individual to incur certain election-related expenses as authorized by AS 15.13.100 for an office that is to be filled at a special election or municipal election before the date that is 18 months before the date of the regular municipal election or that is before the date of the proclamation of the special election at which the candidate or individual seeks election to public office; or

(3) to any candidate later than the 45th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election.

193 We observe that the invalidation of the pre-election year contribution bans affords candidates a greater time period in which to raise campaign funds. Such added time necessarily lessens the danger that candidates may be prevented from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Post-election time limits, however, far more clearly address corruption and its appearance because the election has resolved the critical contingency of which candidate will hold office. We think this latter impact on associational rights is narrowly tailored to further compelling state interests. We therefore uphold the post-election contribution limits of AS 15.13.074(c)(4).

b. *Ban on contributions during the legislative session; AS 15.13.074(c)*

Alaska Statute 15.13.074(c)(2) prohibits making contributions to legislative candidates, including both challengers and incumbents, during a regular legislative session.[194]

AkCLU argues that this ban severely constrains effective campaign advocacy by legislative candidates. "Given the length of the Alaska legislative session, fundraising [under the ban] is limited to a two-month period before a primary election and [to] two and one-half [additional] months before a general election."[195] Moreover, AkCLU claims the assocational rights of potential contributors are severely restricted during the legislative session.

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194 *See* AS 15.13.074(c)(2) set out *supra* note 173. The legislature amended this provision and AS 15.13.072(d) (the corresponding ban on soliciting or accepting contributions during the session) in 1998. Now if the legislature is in session during the ninety days immediately preceding the election in which the legislative candidates are competing, candidates may solicit or accept contributions during that period, so long as they do so outside the capital city. *See* ch. 14 §§ 1, 2, SLA 1998; ch. 74 §§ 3, 5, 19, SLA 1998.

195 As the Florida Supreme Court noted, "[d]uring this period, incumbents have virtually unlimited access to the press and free publicity merely by virtue of the public forum they are privileged to occupy," thus creating obvious potential imbalances. *Florida v. Dodd*, 561 So. 2d 263, 265 (Fla. 1990).

The State argues that this ban "addresses the perception that contributions are made to influence the conduct of elected officials during the session." It also contends that "the prohibition frees sitting legislators from the fund-raising treadmill and allows them to focus on the public's business during the legislative session." The State claims that this interest is compelling enough to support the ban. The Josephson Report survey, in which about sixty percent of legislators stated they believed fundraising during the legislative session needed to be regulated, supports this contention to a limited extent.

Considered in isolation, the "legislator-freeing" rationale is not sufficiently compelling to justify this restriction. In *Rosenstiel v. Rodriguez*, the Eighth Circuit held that freeing legislators to deal with issues was only relevant as a by-product of corruption-fighting measures.[196] In other cases cited by the State, the interest was found sufficient only to promote a speech-enhancing measure.[197]

Preventing corruption or its appearance is a compelling interest justifying narrowly-tailored restraints on First Amendment rights. But the very circumstance most relevant to the appearance of corruption—receipt of contributions by incumbent candidates during the session—does not imply that in-session contributions to challengers also give the appearance of corruption. The ban is therefore not narrowly tailored to the State's compelling interest, and is invalid as to non-incumbents. But invalidating the ban only as to challengers would fundamentally unbalance a restriction which the legislature clearly intended to apply to incumbents and challengers alike, and

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196 *See Rosensteil* [*sic*] *v. Rodriguez*, 101 F.3d 1544, 1533 (8th Cir. 1996).

197 *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39-40 (1st Cir. 1993); *Republican Nat'l Comm. v. Fed. Election Comm'n*, 487 F. Supp. 280, 284 (S.D.N.Y. 1980).

would defeat the legislature's clear intention as to this prohibition. We therefore decline to invalidate only part of this ban while upholding it with respect to incumbent candidates.

Accordingly, we affirm the decision holding these provisions invalid.

E. *Restrictions on the Use of Campaign Funds*

1. *Carry-forward restriction; AS 15.13.116*

Alaska Statute 15.13.116 limits the amount of unused contributions a candidate may carry forward to the next campaign.[198]

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[198] AS 15.13.116 reads, in pertinent part:

> (a) A candidate who, after the date of the general, special, municipal, or municipal runoff election or after the date the candidate withdraws as a candidate, whichever comes first, holds unused campaign contributions shall distribute the amount held within 90 days. The distribution may only be made to
>
> . . . .
>
> (8) transfer all or a portion of the unused campaign contributions to an account for a future election campaign; a transfer under this paragraph is limited to
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> (A) $50,000, if the transfer is made by a candidate for governor or lieutenant governor;
>
> (B) $10,000, if the transfer is made by a candidate for the state senate;
>
> (C) $5,000, if the transfer is made by a candidate for the state house of representatives; and
>
> (D) $5,000, if the transfer is made by a candidate for an office not described in (A)-(C) of this paragraph;
>
> . . . .
>
> (b) After a general, special, municipal, or municipal runoff election, a candidate may retain the ownership of one computer and one printer and of personal property, except money, that was acquired by and for use in the campaign. The current fair market value of the property retained, exclusive of the computer and printer, may not exceed $2,500. All other

AkCLU argues that these "spend down" requirements function as expenditure limits and are invalid. (AkCLU does not challenge AS 15.13.112, which prohibits using contributions for a candidate's personal benefit, or converting contributions to a candidate's personal income.)

The threshold question is whether the carry-forward restriction burdens speech. Two cases the State cites held that similar restrictions directly limited expenditures, and therefore burdened speech.[199] We agree with that analysis. We must therefore decide whether the State has compelling interests justifying this burden.

The State argues that the limits are justified because they prevent candidates who are unopposed, or opposed by weak candidates, from taking contributions in one campaign to avoid limits in the next one. This rationale is plausible. Contribution limits fight corruption, and therefore relate to a compelling state interest. Contribution limits for future campaigns of presently unopposed candidates would effectively double without this provision.[200] Neither of the State's cited cases[201] presented

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property shall be disposed of, or sold and the sale proceeds disposed of, in accordance with (a) or (c) of this section.

(c) Property remaining after disbursements are made under (a)-(b) of this section is forfeited to the state.

199 *See Shrink Mo. Gov't Political Action Comm. v. Maupin*, 71 F.3d 1422, 1427-29 (8th Cir. 1995) (invalidating Missouri's carry-forward restriction); *Service Employees*, 955 F.2d at 1315, 1323 (discussing provision barring expenditure of funds raised before challenged reform measure was enacted).

200 In *Open Secrets*, Larry Makinson cites numerous "popular" methods of evading the former $1,000 contribution limit, including making off-year contributions, donating through family members, donating through corporations, donating through union locals, and pooling donations of employees. *See* Larry Makinson, *Open Secrets* 14.

201 *See Shrink*, 71 F.3d at 1428-29; *Service Employees*, 955 F.2d at 1318-21.

this issue, because the associated contribution limits in both of those cases had been invalidated.

There is evidence of substantial carryovers that appear large in comparison with the total projected expense of campaigns for contested seats. The average victorious state senate candidate in the 1990 general election had a surplus (for our purposes, meaning cash on hand less debts) of $11,450 at the end of the year. The average victorious house candidate that year had a surplus of $8,759. One successful house candidate had a surplus of $33,043; one successful senate candidate had a surplus of $77,034. By way of comparison, the average victorious house campaign for 1994 cost $43,764; the corresponding senate election cost $72,784.

We hold that the State's interest in preventing avoidance of valid contribution limits by use of carry-forwards is both compelling and served by this restriction. We also conclude that this provision is narrowly tailored to accomplish this interest. We therefore reverse that portion of the judgment below.

2. *Ban on inter-candidate contributions; AS 15.13.112(b)(7)*

The Act prohibits a candidate from using campaign funds to contribute to another candidate or to a group.[202]

The State argues that the ban is valid because it prevents: (1) use of donations contrary to the purpose of

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202 AS 15.13.112(b) reads, in pertinent part:

> (b) Campaign contributions held by a candidate or group may not be
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> ....
>
> (7) used to make contributions to another candidate or to a group.

the original contributor; (2) corrupt use of campaign funds for power-brokering; and (3) evasion of contribution limits by funneling. The State relies on David Finkelstein's affidavit for support. Finkelstein affied that "[t]hroughout my time in the Legislature it was common knowledge that certain legislators used campaign contributions to try to secure leadership positions, particularly the Speaker or President." He cited the 1992 speaker's contest as an example, claiming that Republicans threw fundraisers for Democrats to gain support for their speakership candidacies.

A number of candidates apparently have the wherewithal to wield such power. At the end of the 1990 campaign cycle, according to APOC records, ten state senate candidates had surpluses ranging as high as $33,043. Fifty-two house candidates had surpluses, six of which exceeded $20,000.

The State also notes that the law does not impair the candidate's ability to donate personal funds to another candidate.

AkCLU responds by citing *Service Employees*, which dealt with a similar ban contained in a California initiative.[203] The Ninth Circuit there addressed each of the arguments raised by the State here, and rejected each for a different reason. The court refused to accept the "misuse of donations" rationale because it was not sufficiently narrowly tailored. The court, discussing the rationale in the context of intra-candidate transfers, asserted that "this interest in ensuring that contributors are not misled could be served simply by requiring candidates to inform contributors that their contributions might be spent on other

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[203] *See* 955 F.2d at 1315.

races." [204] The Court dismissed the concern about power brokering as follows:

> The Authors [of the initiative] argue that the inter-candidate transfer ban may be justified by the state's interest in preventing corruption or the appearance of corruption by "political power brokers." Even if we assume this to be an important state interest, the ban is not "c')sely drawn to avoid unnecessary abridgement of associational freedoms." The potential for corruption stems not from campaign contributions per se but from large campaign contributions. The inter-candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions. We hold, therefore, that the inter-candidate transfer ban is unconstitutional . . . .[205]

But because the court in *Service Employees* had already invalidated the contribution limits of the California initiative, there was no longer any danger that inter-candidate contributions could be used to avoid valid contribution limits. The court therefore rejected funneling as a valid basis for the ban.[206]

In this case, however, we have upheld the individual contribution limits. Prevention of funneling therefore remains a reasonable rationale for some restriction on inter-candidate contributions. Without restrictions, a candidate

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[204] *Id.* at 1322 ("Concerns about the unintended use of contributors' money can be met 'by means far more narrowly tailored and less burdensome than [a] restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose.' ") (quoting *FEC v. MCFL*, 479 U.S. 238, 261 (1986)).

[205] *Id.* at 1323.

[206] *See id.* at 1322.

experiencing a very easy election or a candidate very successful at fundraising could pass along contributions to other candidates at will; allowing inter-candidate transfers could conceivably permit contributors to evade limits not just once but multiple times. A contributor wishing to make four $500 contributions to candidate A (three more than the individual limit permits) would be able to contribute to candidates B, C, and D, with the expectation they would each pass their surplus contributions on to candidate A.

Because the State has a compelling interest in enforcing contribution limits, and because candidates still retain the right to make contributions from personal funds, we conclude that this provision is constitutional.

F. *Severability of Unconstitutional Provisions*

Because we have concluded that some of these provisions are unconstitutional we must consider the question of severability. Severability is a matter of state law.[207] The seminal case in Alaska is *Lynden Transport, Inc. v. State*, which holds that

> [t]he test for determining the severability of a statute is twofold. A provision will not be deemed severable "unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." [208]

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207 *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996).

208 *Lynden Transport, Inc. v. State*, 532 P.2d 700, 713 (Alaska 1975) (quoting *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924)); *see also Simneman v. Hickel*, 836 P.2d 936, 940-41 (Alaska 1992).

The Act contains a severability clause.[209] Its inclusion indicates that the legislature intended the remainder of the Act to stand if part of it were invalidated. It is also significant that the legislature enacted contingent provisions that were to become effective if parts of the Act were held to be invalid.

Although we hold today that some parts of the Act are unconstitutional, we do not believe that their invalidation so undermines the structure of the Act as a whole that the entire Act must fall. Standing alone, legal effect can be given to the remaining provisions.

Other courts considering severability in the campaign finance context have reached the same conclusion. In *Buckley*, the Supreme Court let stand the public financing provisions of the Federal Election Campaign Act while invalidating expenditure limits.[210] In *Russell v. Burris*, the Eighth Circuit severed the constitutional provisions of an Arkansas campaign reform act, holding that the purpose of the valid provisions would not be thwarted by the invalidation of the others.[211] The district court considering *Colorado Republican* on remand refused to

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209 *See* Ch. 48 § 31, SLA 1996 ("Under AS 01.10.030, if any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances is not affected thereby."). AS 01.10.030 provides:

> Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

210 *See* 424 U.S. at 108-09.

211 *See* 146 F.3d at 573.

hold that the unconstitutional independent expenditure limitation could not be severed from the remainder of the party expenditure provision.[212]

Because we believe the constitutional parts of this Act satisfy the conditions discussed in *Lynden Transport*, we hold those provisions to be severable and reject AkCLU's argument to the contrary.

G. *Other Arguments*

AkCLU's complaint alleges that the ban on anonymous contributions, AS 15.13.074(b),[213] is unconstitutional.

The Supreme Court stated in dictum that a ban on anonymous contributions would be permissible.[214] But because the briefs have not discussed this provision, we decline to reach the issue.

IV. CONCLUSION

To recapitulate:

(1) Because the constitutional parts of the Act can be given legal effect standing alone, in accordance with the legislature's intention, we REVERSE the judgment on the issue of severability, and address each part of the Act on its own merits.

(2) We AFFIRM the judgment to the extent it held invalid the ban on non-election year contributions in the 1996 Act (AS 15.13.074(c)(1), (2), and (3)); and the

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212 *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 1999 WL 86840, at *10 (D. Colo. 1999).

213 AS 15.13.074(b) reads: "A person or group may not make a contribution anonymously, using a fictitious name, or using the name of another."

214 *See Citizens Against Rent Control*, 454 U.S. at 299-300.

ban on contributions to candidates during the legislative session (AS 15.13.074(c)(2)).

(3) We REVERSE the judgment with respect to the following provisions, which we hold to be valid as a matter of law:

(a) the ban on independent expenditures by non-group entities, to the extent it applies to corporations, labor unions, and other entities meeting the three-part test outlined in Part III (AS 15.13.135);

(b) the ban on contributions by corporations, labor unions, and other entities meeting the three-part test outlined in Part III (AS 15.13.074(f));

(c) the limits on contributions by individuals (AS 15.13.070(b)), groups (AS 15.13.070(c)), and political parties (AS 15.13.070(d));

(d) the restrictions on contributions by non-resident individuals and groups (AS 15.13.072(a)(2) and (3), (e), and (f));

(e) the ban on lobbyists' contributions to out-of-district candidates (AS 15.13.074(g));

(f) the restriction on carry-forwards (AS 15.13.116); and

(g) the ban on inter-candidate contributions (AS 15.13.112(b)(7)).

(6) We leave it to future legal challenges to determine which specific classes of "non-group" entities besides corporations and labor unions may be permissibly subject to the expenditure and contribution bans set out in AS 15.13.135 and 15.13.074(f).

APPENDIX B

[Entered Aug. 10, 1998]

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case No. 3AN-97-5289-Civil

ALASKA CIVIL LIBERTIES UNION,
Plaintiff,

vs.

STATE OF ALASKA,
Defendant.

DECISION AND ORDER:

1. GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT;
2. DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT;

and

3. RENDERING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION MOOT

DISCUSSION

Plaintiff, Alaska Civil Liberties Union (AkCLU), has moved for Summary Judgment, asking that the Campaign Finance Reform Legislation, Senate Bill 191, be declared

unconstitutional and therefore null and void, with no legal force or effect. The State of Alaska has opposed, and has cross-motioned for Summary Judgment in its favor. Plaintiff has also moved for a Preliminary Injunction, seeking to enjoin the state from enforcing the 1996 Campaign Finance Reform provisions. Oral Argument has been heard on both motions.

At the outset, the court wants to make it clear that it intends to address the motions for Summary Judgment in a somewhat summary fashion. This is certainly not a reflection of the magnitude of the issue, which is significant, nor is it a reaction to the briefing and argument of counsel, which were both exhaustive and excellent for both sides. And it is clearly not a reflection of the court's time and effort or extent of review of the issues presented. Rather, it is the result of what this court believes is a realistic assessment of its role *vis-a-vis* the role of appellate review of matters of this constitutional consequence. As the 8th Circuit recently pointed out:

> The Supreme Court has instructed that, in cases involving the First Amendment, Appellate Courts are to make an independent examination of the whole record to ensure that their judgments do not constitute a forbidden intrusion on the right of free expression. See New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L. Ed. 2d 686 (1964). But we are also mindful of Fed. R. Civ. P. 52(a), which provides that a trial court's factual findings are typically reviewed for clear error.
>
> To reconcile these two legal propositions, we held last year that in cases involving the First Amendment, we would review findings of noncritical facts for clear error, but would conduct an independent review of critical facts. *Russell v. Burris*,—F.3d—, 1998 WL 289879 (8th Cir. June 4, 1998).

Recognizing this procedural posture, the court rules on the motions as a matter of law, fully aware that upon appellate review this court is owed no deference on either findings of critical facts or conclusions of law. Upon remand, this court of course stands ready to conduct whatever evidentiary inquiry may be directed.

An initial response to campaign finance reform, from diverse political perspectives, is that in almost any form it must be a good thing. It may be fair to say that a common public perception, or at least a common public concern, is that politicians are simply "bought and paid for." But the challenge for the court, and for all citizens, is to make a critical examination and to look deeper into the essence of our First Amendment guarantees regarding freedom of speech, expression, and association. While we as citizens may have a generalized fear of potential for corruption and undue influence resulting from campaign contributions and expenditures, it is well settled that without a showing of actual harm, the overriding First Amendment concerns must prevail.

As a result, and in short, the court is persuaded by, and adopts, the position argued by AkCLU, and it grants AkCLU's Motion for Summary Judgment. By invalidating the 1996 act, the court does not mean to invalidate the legitimate concern of those citizens who believe that politics has become little more than a fund-raising rat-race. But the case law interpreting the issue of contributions and expenditures as expressions of free speech is clear.

While the court adopts the position argued by Plaintiff and does not intend to review it point-by-point here, the court does make the following brief summary.

The seminal case on this issue is *Buckley v. Valeo,* 424 U.S. 1 (1976), and as it pertains to this case now before the court, it stands for the following propositions:

1. For the state to show a compelling state interest which justifies infringing upon protected First Amendment rights, the state must demonstrate the existence or appearance of corruption. In this context, however, the term "appearance" means more than the vernacular "concern that too much money is being spent in political campaigns;" rather, it requires a showing of "real harm." *Colorado Republican Federal Campaign Committee v. FEC,* —— U.S. ——, 116 S.Ct. 2309, 135 L. Ed. 2d 795 (1996); *Vogler v. Miller,* 651 P.2d 1 (Alaska, 1983).

While the court does not wish to hoist the state on the petard of its own language, it does believe that the state summarized the essence of the matter in its Memorandum in Opposition to Motion for Preliminary Injunction, where it said at page 7 that "the initiative arose because of concerns that large contributions distorted the political process and made elected officials captive to the pressures of raising campaign funds."

On its face this concern, while it may present a very real issue, does not represent a "real harm" of actual or apparent corruption.

2. While some limits on campaign contributions may be appropriate, such as the 1976 *Buckley* $1,000 limit per election, for a $2,000 total for the primary and general election, significantly lower limits could amount to an impermissible "difference in kind." *Carver v. Nixon,* 72 F. 3d 633, 644 (8th Cir. 1995). Adjusted for inflation, and given the fact that the 1996 Act limits contributions to $500 total, versus the $2,000 permitted

under *Buckley* in 1976, the only conclusion to be drawn is that the limit set by the 1996 act amounts to a "difference in kind." Although the court understands the state's argument that the $1,000 federal limit has not been altered over the years, it flies in the face of reason to assume that this 1976 provision somehow serves as a "grandfather governor" over all future campaign statutory contribution limits, regardless of when they are contemplated and enacted.

3. *Buckley*, and subsequent cases, have rejected the notion of using campaign contribution limits to somehow "level the playing field" amongst wealthy and less wealthy citizens. *Buckley*, 424 U.S. 1, at 48, 49. The court agrees with Plaintiff's assessment that the state has nevertheless argued "leveling the playing field" in part, as justification for upholding the 1996, Act. To the extent this argument is made or suggested, it is rejected, just as it was rejected in *Buckley*.

SEVERABILITY

The court is aware of, and has considered, the state's arguments regarding severability of various provisions of the 1996 Act should the court find other provisions unconstitutional. Again, however, this lower court is persuaded by and adopts the Plaintiff's argument on this issue, and finds that the various provisions of the act are so inextricably intertwined so as to not find them severable.

Based upon the above discussion, upon a review of the briefing filed on the issues and the argument presented thereon, and upon a review of the entire record herein,

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Summary Judgment is GRANTED, and the Campaign Finance Reform Legisla-

tion, Senate Bill 191, is declared unconstitutional and therefore null and void, with no legal force or effect. The state is therefore directed to conduct the present campaign according to the laws in force and effect as of the date of enactment of the 1996 Act;

2. Defendant's Cross Motion for Summary Judgment is DENIED; and

3. Plaintiff's Motion for Preliminary Injunction is MOOT.

ENTERED this 10th day of August, 1998, at Anchorage, Alaska.

/s/ Michael L. Wolverton
MICHAEL L. WOLVERTON
Superior Court Judge

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Alaska Stat. Ann. § 15.13.065 (Lexis 1998). Contributions.

* * *

(c) Except for reports required by AS 15.13.040 and 15.13.110 and except for the requirements of AS 15.13.050, 15.13.060, and 15.13.112-15.13.114, the provisions of AS 15.13.010-15.13.116 do not apply to limit the authority of a person to make contributions to influence the outcome of a ballot proposition.

* * *

Alaska Stat. Ann. § 15.13.070 (Lexis 1998). Limitations on amount of political contributions.

* * *

(b) An individual may contribute not more than

(1) $500 per year to a candidate, to an individual who conducts a write-in campaign as a candidate, or to a group that is not a political party;

(2) $5,000 per year to a political party.

(c) A group that is not a political party may contribute not more than $1,000 per year

(1) to a candidate, or to an individual who conducts a write-in campaign as a candidate; or

(2) to another group or to a political party.

(d) A political party may contribute to a candidate, or to an individual who conducts a write-in campaign, for the following offices an amount not to exceed

(1) $100,000 per year, if the election is for governor or lieutenant governor;

(2) $15,000 per year, if the election is for the state senate;

(3) $10,000 per year, if the election is for the state house of representatives; and

(4) $5,000 per year, if the election is for

(A) delegate to a constitutional convention;

(B) judge seeking retention; or

(C) municipal office.

* * *

Alaska Stat. Ann. § 15.13.072 (Lexis 1998). Restrictions on solicitation and acceptance of contributions.

(a) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may not solicit or accept a contribution from

(1) a person not authorized by law to make a contribution;

(2) an individual who is not a resident of the state at the time the contribution is made, except as provided in (e) of this section;

(3) a group organized under the laws of another state, resident in another state, or whose participants are not residents of this state at the time the contribution is made; or

* * *

(e) A candidate or an individual who has filed with the commission the document necessary to permit that individual to incur election-related expenses under AS 15.13.100 may solicit or accept contributions from an individual who is not a resident of the state at the time

the contribution is made if the amounts contributed by individuals who are not residents do not exceed

(1) $20,000, if the candidate or individual is seeking the office of governor or lieutenant governor;

(2) $5,000, if the candidate or individual is seeking the office of state senator;

(3) $3,000, if the candidate or individual is seeking the office of state representative or municipal or other office.

(f) A group or political party may solicit or accept contributions from an individual who is not a resident of the state at the time the contribution is made, but the amounts accepted from individuals who are not residents may not exceed 10 percent of total contributions made to the group or political party during the calendar or group year in which the contributions are received.

* * *

Alaska Stat. Ann. § 15.13.074 (Lexis 1998). Prohibited contributions.

* * *

(c) A person or group may not make a contribution

* * *

(4) to any candidate after the earlier of December 31 of the year of the election or the 60th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election;

* * *

(f) A corporation, company, partnership, firm, association, organization, busines trust or surety, labor union, or publicly funded entity that does not satisfy the definition of group in AS 15.13.400 may not make a contribution to a candidate or group.

(g) An individual required to register as a lobbyist under AS 24.45 may not make a contribution to a candidate for the legislature at any time the individual is subject to the registration requirement under AS 24.45 and for one year after the date of the individual's initial registration or its renewal. However, the individual may make a contribution under this section to a candidate for the legislature in a district in which the individual is eligible to vote or will be eligible to vote on the date of the election. An individual who is subject to the restrictions of this subsection shall report to the commission, on a form provided by the commission, each contribution made while required to register as a lobbyist under AS 24.45. This subsection does not apply to a representational lobbyist as defined in regulations of the commission.

* * *

Alaska Stat. Ann. § 15.13.112 (Lexis 1998). Uses of campaign contributions held by candidate or group.

* * *

(b) Campaign contributions held by a candidate or group may not be

* * *

(7) used to make contributions to another candidate or to a group.

Alaska Stat. Ann. § 15.13.116 (Lexis 1998). Disbursement of campaign assets after election.

(a) A candidate who, after the date of the general, special, municipal, or municipal runoff election or after the date the candidate withdraws as a candidate, whichever comes first, holds unused campaign contributions shall distribute the amount held within 90 days. The distribution may only be made to

* * *

(7) transfer all or a portion of the unused campaign contributions to an account for a future election campaign; a transfer under this paragraph is limited to

(A) $50,000, if the transfer is made by a candidate for governor or lieutenant governor;

(B) $10,000, if the transfer is made by a candidate for the state senate;

(C) $5,000, if the transfer is made by a candidate for the state house of representatives; and

(D) $5,000, if the transfer is made by a candidate for an office not described in (A)-(C) of this paragraph;

* * *

(b) After a general, special, municipal, or municipal runoff election, a candidate may retain the ownership of one computer and one printer and of personal property, except money, that was acquired by and for use in the campaign. The current fair market value of the property

retained, exclusive of the computer and printer, may not exceed $2,500. All other property shall be disposed of, or sold and the sale proceeds disposed of, in accordance with (a) or (c) of this section. Notwithstanding any other provision of this chapter, a candidate may (1) retain a bulk mailing permit that was paid for with campaign funds, and (2) use personal funds, campaign funds, or unused campaign contributions transferred to a public office expense term account under (a)(8) of this section to pay the continuing charges for the permit after the election. Money used to continue the life of the permit is not considered to be a contribution under this chapter. In addition to any other use permitted under this chapter, during the candidate's term of office, the candidate may use the bulk mailing permit for mailings associated with service in the office to which the candidate was elected. During the candidate's term of office, if the candidate files a declaration of candidacy or a letter of intent to become a candidate for the same or a different elective office, the candidate may also use the bulk mailing permit in that election campaign.

(c) Property remaining after disbursements are made under (a)-(b) of this section is forfeited to the state. Within 30 days, the candidate shall deliver the property to the Department of Revenue. The Department of Revenue shall deposit any money received into the general fund and dispose of any other property in accordance with law.

* * *

Alaska Stat. Ann. § 15.13.135 (Lexis 1998). Independent expenditures for or against candidates.

(a) Only an individual or group may make an independent expenditure supporting or opposing a candidate for election to public office. An independent expenditure supporting or opposing a candidate for election to public office shall be reported in accordance with AS 15.13.040 and 15.13.100-15.13.110 and other requirements of this chapter.

(b) An individual or group who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office

(1) shall comply with AS 15.13.090; and

(2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

Alaska Stat. Ann. § 15.13.400 (Lexis 1998). Definitions.

* * *

(3) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomi-

nation or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or ballot proposition or question, but it does include professional services volunteered by individuals for which they ordinarily would be paid a fee or wage;

(ii) services provided by an accountant or other person to prepare reports and statements required by this chapter; or

(iii) ordinary hospitality in a home;

(4) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another

person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(5) "group" means

(A) every state and regional executive committee of a political party; and

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than

one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate;

* * *

(7) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

(8) "individual" means a natural person;

* * *

(10) "political party" means

(A) an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at any one of the last five preceding general elections for governor; and

(B) a subordinate unit of the organized group of voters qualifying as a political party under (A) of this paragraph if, consistent with the rules or bylaws of the political party, the unit conducts or supports campaign operations in a municipality, neighborhood, election district, or precinct;

* * *

ALASKA SESSION LAWS INVOLVED

Campaign Finance Reform Act, Alaska Stat. Ann., Temporary and Special Acts, § 1, ch. 48 (Lexis 1996). Findings and purpose.

(a) The legislature finds that, under existing laws,

(1) campaigns for elective public office last too long, are often uninformative, and are too expensive;

(2) highly qualified citizens are dissuaded from running for public office due to the high cost of election campaigns;

(3) organized special interests are responsible for raising a significant portion of all election campaign funds and may thereby gain an undue influence over election campaigns and elected officials, particularly incumbents;

(4) incumbents enjoy a distinct advantage in raising money for election campaigns, and many elected officials raise and carry forward huge surpluses from one campaign to the next, to the disadvantage of challengers;

(5) because, under existing laws, candidates are completely free to convert campaign funds to personal income, there is great potential for bribery and political corruption; and

(6) penalties for violations of the existing campaign finance laws are far too lenient to deter misconduct.

(b) It is the purpose of this Act to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government.

Alaska Stat. Ann. § 15.13.074(c)(4) (1996) (amended by § 5, ch. 74, SLA 1998). Prohibited contributions.

* * *

(c) A person or group may not make a contribution

* * *

(4) to any candidate later than the 45th day

(A) after the date of a primary election if the candidate

(i) has been nominated at the primary election or is running as a write-in candidate; and

(ii) is not opposed at the general election;

(B) after the date of the primary election if the candidate was not nominated at the primary election; or

(C) after the date of the general election, or after the date of a municipal or municipal runoff election, if the candidate was opposed at the general, municipal, or municipal runoff election;

* * *

Alaska Stat. Ann. § 15.13.116(a)(7) (1996) (amended by § 8, ch. 74, SLA 1998). Disbursement of campaign assets after election.

(a) A candidate who, after the date of the general, special, municipal, or municipal runoff election or after the date the candidate withdraws as a candidate, whichever comes first, holds unused campaign contributions shall distribute the amount held within 90 days. The distribution may only be made to

* * *

(8) transfer all or a portion of the unused campaign contributions to an account for a future election campaign; a transfer under this paragraph is limited to

(A) $50,000, if the transfer is made by a candidate for governor or lieutenant governor;

(B) $10,000, if the transfer is made by a candidate for the state senate;

(C) $5,000, if the transfer is made by a candidate for the state house of representatives; and

(D) $5,000, if the transfer is made by a candidate for an office not described in (A)-(C) of this paragraph;

* * *

(b) After a general, special, municipal, or municipal runoff election, a candidate may retain the ownership of one computer and one printer and of personal property, except money, that was acquired by and for use in the campaign. The current fair market value of the property retained, exclusive of the computer and printer, may not exceed $2,500. All other property shall be disposed of, or sold and the sale proceeds disposed of, in accordance with (a) or (c) of this section.

(c) Property remaining after disbursements are made under (a)-(b) of this section is forfeited to the state. Within 30 days, the candidate shall deliver the property to the Department of Revenue. The Department of Revenue shall deposit any money received into the general fund and dispose of any other property in accordance with law.

Supreme Court, U.S.
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No. 99-128

IN THE
Supreme Court of the United States

ALASKA CIVIL LIBERTIES UNION,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction because the Alaska Civil Liberties Union does not have standing in federal court to challenge on its own behalf the Alaska campaign finance reform statutes?

2. Whether this Court should review the finding of the Alaska Supreme Court—based upon "more than 1800 pages of documents" (Pet. App. 5a)—that the State of Alaska has presented sufficient evidence to meet the "real harm" or "real problem" standard justifying campaign finance controls—the standard that the Alaska Civil Liberties Union itself argues should be applied in this case?

3. Whether this Court should grant certiorari to review the Alaska Supreme Court's 81-page decision that the various provisions of Alaska's campaign finance reforms comport with this Court's precedents, a decision on which there is no conflict of authority in the state or federal courts?

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IN THE

Supreme Court of the United States

No. 99-128

ALASKA CIVIL LIBERTIES UNION,
Petitioner,

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STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

BRIEF IN OPPOSITION

JURISDICTION

This Court lacks jurisdiction because, as explained below, the Alaska Civil Liberties Union (hereinafter AkCLU) does not have standing to bring this matter before the Court. AkCLU has failed to demonstrate the existence of any actual or prospective injury that would afford it standing under Article III of the Constitution. *See infra* pp. 11-16.

STATEMENT OF THE CASE

The Alaska State Legislature responded to concerns over actual or apparent corruption in Alaska by reforming state campaign finance laws in 1996. The legislature adopted a unique combination of many varied statutory devices to address Alaska's campaign finance concerns.

The Motives for the Reforms

Alaskans had reason to be concerned about the integrity of their campaign finance system. Studies of campaign contribution patterns in 1986 and 1987 indicated that contributors were able to evade the purposes of Alaska's previous campaign finance statutes by directing contributions through interconnected corporations and individuals. Larry Makinson, *Open Secrets* 4, 14-15, 17 (1986) (Ex. F to State's Mem. Opp'n Pl.'s Mot. Summ. J. (Mar. 13, 1998) [hereinafter Opp'n Mem.]); Larry Makinson, *Open Secrets* 4, 14-15, 17 (1987) (Ex. E to Opp'n Mem.). A study of contributions to Alaska's 1990 election campaigns reinforced the belief that individual voters were losing influence with their elected representatives, who were dependent upon political parties, labor unions, and corporate special interests to finance their campaigns. Western States Center, *Money in Western Politics, Alaska 1990 Elections, A Study in Campaign Financing* (1992) (Ex. G to Opp'n Mem.). An analysis of contributions to campaigns in Alaska's 1994 election cited examples of contributors' unlawful use of related persons and organizations as conduits to provide large contributions to candidates. Alaska Public Interest Research Group, *The Best Politicians Money Can Buy* 000858-60 (Nov. 1995) (Ex. JC-1 to Opp'n Mem.). Throughout this period, reports in Alaska's largest newspaper, the *Anchorage Daily News*, described contribution practices that provided additional cause for Alaskans to believe that their campaign finance system needed repair. Pet. App. 43a, 47a-48a; Ex. MF-2 to Opp'n Mem.

Even insiders to Alaskan politics recognized the need for reform. A 1990 report of a confidential survey of lobbyists, legislators, and public officials in Alaska noted that "the level of trust and confidence in the integrity of the legislature is disturbingly low." Government Ethics

Center, *Report to the Alaska State Senate* 7 (Apr. 2, 1990) (Ex. H to Opp'n Mem.) (cited at Pet. App. 6a). A significant percentage of the survey respondents acknowledged a serious problem caused by calculated evasions of the purpose and spirit of Alaska's campaign finance laws through legalistic techniques. *Id.* at 22. The survey also produced striking findings concerning the effects of campaign contributions and fundraising on legislators' actions. For example, 47 percent of the responding lobbyists reported that at least a quarter of the sitting legislators could be influenced by campaign contributions to take or withhold some significant legislative action. *Id.* at 16. Of the responding lobbyists, 35 percent believed that special interests that provided financial support to legislators had a significant advantage in obtaining access to and persuading legislators. *Id.* at 15, 24.

The State submitted to the trial court affidavits of current and former officeholders in Alaska that described in remarkably candid terms their struggles of conscience in balancing the influence of campaign contributions against their duties to serve the public. For example, former Alaska Governor Jay Hammond stated that, after receiving a contribution from oil interests for one of his successful legislative campaigns, he initially resolved to support a measure that the oil interests would not favor, in order to prove his independence. Aff. J. Hammond 3 (Ex. JJ to Opp'n Mem.). After additional thought, however, he concluded that voting for the measure because of the contribution would be just as wrong as voting against it because of the contribution. *Id.* Former Governor Hammond ultimately voted for the measure, and, he said, "[a]lthough I like to think that I cast those votes based on the merits of each bill, to this day I am not sure of my true motivation." *Id.* at 4; Pet. App. 49a.

Other former public officials described similar experiences. A former member of the Alaska Legislature, David Finkelstein, admitted that although he resisted the influence of large contributions in voting on major bills, large contributors did influence his votes on some minor issues about which he knew little. Aff. D. Finkelstein 3-4 (Ex. LL to Opp'n Mem.); Pet. App. 49a. While he was a member of the Anchorage Municipal Assembly, Charles Wohlforth stated that

> I have at times found it impossible to dissect my own motives in voting on complex issues with conflicting and incomplete information and faced by advocacy from important contributors to my campaigns. Despite my best efforts and particular concern about campaign finance reform, I cannot with complete confidence say I have never been influenced by campaign contributions.

Aff. C. Wohlforth 3 (Ex. MM to Opp'n Mem.); Pet. App. 49a-50a.

Mr. Wohlforth also noted the effect of contributions on the outcome of Assembly votes, observing that "[t]he times when the outcome of an issue is in real doubt usually is when neither side of the issue has money or both do." Aff. C. Wohlforth 3 (Ex. MM to Opp'n Mem.). Mr. Wohlforth stated that both he and members of community groups had "become disillusioned with a process in which campaign money often seems to mean more to decisions than debate, deliberation and the public good." *Id.* at 3-4. Similarly, former Governor Jay Hammond commented that "[i]t is amazing how a flash of green can help clarify an ambiguous policy choice." Aff. J. Hammond 7 (Ex. JJ to Opp'n Mem.).

The experiences of these and other officeholders afforded them insiders' views of the problems with Alaska's

previous campaign finance scheme. Former Governor Steve Cowper explained that "[s]pecial interests place their contributions with elected officials whose constituents don't care about an issue important to the contributor," making "it easier for the elected official to do the bidding of the special interests without concern for the wishes of their constituents." Aff. S. Cowper 3-4 (Ex. HH to Opp'n Mem.). The former governor stated that "most of the money contributed to campaigns comes from interest groups and beneficiary classes, most of which demand and often receive special consideration." *Id.* at 2. He also stated that, under the previous rules, "[c]ontributions were bundled by corporations and unions from officers and employees associated with them so that greater amounts were given to candidates thereby increasing the amount given to a particular candidate and increasing the influence of the core contributor." *Id.* at 4-5 (quoted at Pet. App. 23a). He observed that the wealth of unions and corporations gave them "more influence over elected officials than the individuals who elect them." *Id.* at 5 (quoted at Pet. App. 23a). Former Governor Cowper also stated that, at times, "[m]oney given to a political party by a contributor was earmarked for pass-through to a specific candidate," making "a mockery of contribution limits and turn[ing] political parties into money launderers." *Id.* at 4.

Reports of the agency charged with enforcing Alaska's campaign finance laws further illustrated the need for reform. The Alaska Public Offices Commission's annual reports demonstrated that campaign contributions in small amounts from individual contributors were steadily decreasing as a percentage of candidates' total campaign funds. Alaska Public Offices Commission, *1981 and 1982 Annual Report, Supplemental Tables* 169 (Ex. O to Opp'n Mem.); Alaska Public Offices Commission, *The*

Size of Campaign Dollars, 1988 Legislative Races (Ex. R to Opp'n Mem.); *see also* Western States Center, *Money in Western Politics, Alaska 1990 Elections, A Study in Campaign Financing* 4-A (1992) (Ex. G to Opp'n Mem.). The commission also concluded that contributions during election off-years were a cause for concern, observing that "[t]he lack of contribution deadline and campaign close-out dates fosters the appearance of post-election influence." Alaska Public Offices Commission, *Annual Report to Legislature FY 1989* 10 (1989) (Ex. T to Opp'n Mem.). In addition, in 1989 four of the five commission members supported bans on contributions by political action committees, unions, and corporations, on the belief that "apart from political parties, only those who may vote should be entitled to contribute to candidates," to avoid the appearance that special interests had special influence. *Id.* (quoted at Pet. App. 24a).

Some of the problems that Alaskans perceived in their campaign finance system reflected the State's unique characteristics. For example, although Alaska is the largest State by acreage, only Vermont and Wyoming have fewer residents, and no other State has a lower population density. United States Bureau of the Census, State Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 (1998 estimates) (found at www.census.gov/population/estimates/state/st-98-1.txt)); United States Bureau of the Census, State Rankings List, Persons Per Square Mile of Land Area (1997 estimates) (found at www.census.gov/Press-Release/state02.prn). This diffusion of Alaska's population fosters special concerns over the influence of moneyed interests, particularly in light of the fact that Alaska's capital, Juneau, is inaccessible by road to more than ninety percent of the State's populace. Because Alaska's legislature is geographically isolated from the

State's core population during its legislative sessions, contributions from lobbyists and special interest groups that travel to Juneau are particularly susceptible to the perception that they are buying access to and influence over legislators. Moreover, the fact that Alaska's economy is highly dependent on the development of the State's substantial mineral and wildlife resources heightens concerns over the influence of special interests in Alaska's election campaigns.

The Reforms' Provisions

The campaign finance reforms that the Alaska Legislature adopted in 1996 address these and other problems in a variety of ways. The reform measures limit the use of campaign funds by halting the former practice of allowing candidates to convert contributions to personal income. Alaska Stat. § 15.13.112(b)(2) (Lexis 1998). The reforms also prohibit candidates from using campaign funds to make contributions to other campaigns. *Id.* § 15.13.112 (b)(7).

In addition, the reforms limit the amounts that donors may contribute to candidates. An individual may contribute a maximum of $500 per calendar year to a particular candidate, while a group may contribute no more than $1,000 per year to a candidate. *Id.* § 15.13.070(b)(1) and (c)(1). The limits on political parties' contributions vary depending on the office that the candidate is seeking. *Id.* § 15.13.070(d). The maximum annual contributions that a political party may make range between $100,000 to a gubernatorial candidate and $5,000 to a candidate for municipal office. *Id.* § 15.13.070(d)(1) and (4).

The reform measures also close loopholes in campaign contribution limits by limiting contributions to political parties and groups. An individual may contribute a maximum of $5,000 annually to a political party and a maxi-

mum of $500 per year to a group. *Id.* § 15.13.070(b)(1) and (2). A group may contribute no more than $1,000 per year to another group or a political party. *Id.* § 15.13.070(c)(2).

When adopted, the 1996 reform measures prohibited nonelection-year contributions and, for the most part, contributions to legislative candidates during the legislative session. *Id.* § 15.13.074(c)(1)(B), (2), and (2)(B). However, the Alaska Supreme Court found these limits too restrictive. Pet. App. 69a, 73a. As a result, a contingent provision of the 1996 reforms has taken effect, allowing contributions during the eighteen months preceding a general election. Pet. App. 70a & n.192, 73a.[1]

The 1996 reform legislation also limits post-election contributions. *See* Alaska Stat. § 15.13.074(c)(4) (Lexis 1998); 1996 Alaska Sess. Laws ch. 48, §§ 11, 12. In addition, the reforms require candidates to distribute unused campaign contributions within 90 days after the election (or after the candidate withdraws from the election), and limit the purposes for which candidates may make such distributions. Alaska Stat. § 15.13. 116(a) (Lexis 1998). The reform legislation limits the amount of unused campaign contributions that candidates may carry forward to future campaigns. *Id.* § 15.13.116(a)(7).

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[1] Petitioner AkCLU errs in stating that Alaska's law limits an individual's contributions to a candidate to only 25 percent of the combined primary and general election contribution limit that the Court approved in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). Pet. 2-3. Because the contingent provision allowing an 18-month period to make contributions has taken effect, a contributor may split contributions to a candidate between two calendar years. Thus, while the limit on an individual's contributions to a candidate remains $500 per year, by making maximum contributions in separate calendar years, an individual may directly contribute up to $1,000 to a particular candidate.

The legislature also adopted provisions designed to address public concerns over the influence of special interest groups. The reform measures limit the roles of corporations, other business entities, and labor unions in campaign finance. *Id.* § 15.13.074(f). The reforms also restrict lobbyists' involvement in campaign financing. *Id.* § 15.13.074(g). The reform legislation prohibits the use of charitable gaming proceeds to support candidates, political parties, or any group seeking to influence the outcome of an election. *Id.* § 05.15.150(a)(3). In addition, the reforms limit total contributions that a candidate or group may accept from nonresidents of Alaska. *Id.* § 15.13.072(a)(2)-(3), (e), and (f).

The Proceedings Below

Six months after the 1996 reforms took effect, AkCLU alone—without the participation of any individual members, residents, or candidates as co-plaintiffs—filed a complaint in Alaska Superior Court, challenging the reforms' constitutionality. Compl. for Decl. and Inj. Relief (July 3, 1997). After AkCLU moved for summary judgment, the State opposed AkCLU's motion, cross-moved for summary judgment, and in support of its motion, submitted more than 1800 pages of evidence, including fifteen affidavits (three of which were from former governors), independent studies of campaign contributions in Alaska, a study commissioned by the state senate, news clippings, Alaska Public Offices Commission reports, and campaign disclosure records. More than a year later, the Superior Court granted AkCLU's motion for summary judgment and denied the State's cross-motion for summary judgment. Decision and Order (Aug. 10, 1998). The Superior Court ruled the 1996 reforms invalid in their entirety. *Id.* at 4.

The Alaska Supreme Court granted a stay of the Superior Court's decision, ordered briefing on an expedited

basis, and then reversed the lower court's decision in substantial part. Order (Aug. 13, 1998); Pet. App. 80a-81a. In its review of the Superior Court's decision, the Alaska Supreme Court applied to the substantial factual record the analysis that this Court adopted in its decisions addressing campaign finance issues, from *Buckley v. Valeo* forward. The Alaska Supreme Court affirmed the Superior Court's determination that the bans on pre-election year contributions and on contributions during the legislative session were unconstitutional. Pet. App. 80a-81a. The court adopted a narrow reading of the reforms' restrictions on the expenditures and contributions of entities that do not constitute groups under Alaska's laws, leaving for future challenges determination of the constitutionally permissible scope of those restrictions. Pet. App. 26a-30a, 81a. But the court reversed the Superior Court on the remaining issues, finding that the balance of the 1996 reform measures do not violate the constitutional rights of speech and association. *Id.* at 81a. The Alaska Supreme Court found in the record evidence of "real harm," establishing the State's compelling interest in preventing corruption and its appearance, and held that most of the reforms' provisions were narrowly tailored to serve that interest.

REASONS FOR DENYING THE WRIT

None of the criteria governing certiorari warrant granting the petition. In the first place, this Court lacks jurisdiction to review the decision below because AkCLU lacks standing to challenge the Alaska campaign finance reforms in federal court. In any event, the Alaska Supreme Court below recognized and faithfully applied this Court's decisions—including *Buckley* and *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Its decision does not conflict with any state or

federal court decision. In carefully reviewing the Alaska statutes, moreover, the Alaska Supreme Court applied the "real harm" or "real problem" standard that AkCLU itself argues should be applied. There is no reason for this Court to review the Alaska Supreme Court's determination—based on "more than 1800 pages of documents" (Pet. App. 5a) demonstrating Alaska's unique experience with campaign finance problems—that the challenged portions of the reforms meet that standard.

Nor is there any reason to hold this case for the outcome of *Nixon v. Shrink Mo. Gov't PAC* (No. 98-963). That case presents the question whether campaign finance statutes should be reviewed for First Amendment purposes under the "real harm" standard or a less demanding standard. Since the Alaska Supreme Court has already reviewed the Alaska campaign finance reforms under the more demanding "real harm" standard, *Nixon* will not affect the outcome of this case. And, in any event, since AkCLU lacks standing to challenge the Alaska statutes in this Court, the Court would lack jurisdiction to grant the petition and ask the state supreme court to reconsider its ruling in light of *Nixon*. Thus, this Court should deny this petition now to remove any doubts as to the validity of the Alaska Supreme Court's ruling upholding the challenged provisions.

I. AkCLU LACKS STANDING TO BRING ITS CHALLENGE TO FEDERAL COURT.

This case is a singularly ill-suited vehicle to address any of the questions presented because AkCLU—the only petitioner—lacks standing to challenge Alaska's 1996 campaign finance reform statutes on its own behalf. Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Each federal appellate court is obligated to satisfy itself of its own

jurisdiction, even if the parties are prepared to concede the existence of jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "Standing to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citations omitted).

"Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" includes three elements. *Id.* First, the plaintiff must have suffered an injury to a legally protected interest. *Id.* Second, there must be a causal connection between the injury and the conduct that is the object of the complaint. *Id.* Third, it must be likely that a favorable decision will redress the injury. *Id.* at 561.

To satisfy the first element of the standing requirements, there must be an "injury in fact." The injury must be concrete and "affect the plaintiff in a personal and individual way." *Id.* & n.1. Federal courts may not "adjudicate challenges to state measures absent a showing of actual impact *on the challenger*." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997) (emphasis added). "An interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Id.* at 64. Furthermore, the injury must be actual or imminent, not merely conjectural or hypothetical. *Defenders of Wildlife*, 504 U.S. at 560.

The party invoking federal jurisdiction bears the burden of establishing the existence of each of these elements of standing. *Id.* at 561. These elements "are not mere

pleading requirements but rather an indispensable part of the plaintiff's case."[2] *Id.* Accordingly, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. at 518. Moreover, "it is not 'sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings.'" *Williamsport Area Sch. Dist.*, 475 U.S. at 547 (quoting *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1883)). "[T]he necessary factual predicate may not be gleaned from the briefs and arguments themselves," but "must affirmatively appear in the record." *Id.* at 546-47.

AkCLU has not met this burden. The record discloses no evidence of actual or threatened injury to AkCLU or its members. Rather, AkCLU fires a broadside attack on Alaska's 1996 campaign finance reforms, apparently on behalf of any individual or entity that the reforms may affect.

In its complaint, AkCLU alleged that

> Plaintiff AkCLU is a non-profit corporation established in 1983 with its principal place of business in Anchorage, Alaska. Plaintiff is the Alaska affiliate of the Alaska [sic, American] Civil Liberties Union. The AkCLU's mission is to protect the civil liberties guaranteed by the United States and Alaska Constitutions.

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[2] In *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), the Court concluded that, if the original plaintiffs lack Article III standing, the Court may nonetheless review a state court decision if the petitioners seeking to invoke the Court's jurisdiction on review (*i.e.*, the defendants in state court) satisfy the standing requirements. *Id.* at 623-24. Here, however, AkCLU is both the plaintiff below and the petitioner seeking review in federal court. Therefore, *ASARCO* is inapposite.

Pl.'s Compl. 1 (July 3, 1997); *see also* Pet. 4. AkCLU did not, however, allege any injury to itself or its members as a consequence of the 1996 reforms. Instead, AkCLU's complaint alleges harm to "people," "persons," "citizens," "candidates," "lobbyists," "nonresidents," and "political parties, corporations, companies, partnerships, firms, associations, organizations, business trusts or sureties, labor unions or publicly funded entities." Pl.'s Compl. at 4-8.

Nowhere in AkCLU's complaint or any affidavit that AkCLU has submitted is there any evidence that AkCLU or its members have suffered the concrete, personal injury necessary to establish standing.[3] "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (to meet Article III standing requirements, plaintiff must allege an injury to *himself*). AkCLU alleges injury to no interest other than "the interest shared generally with the public at large in the proper application of the Constitution and laws." *Arizonans for Official English*, 520 U.S. at 64.

AkCLU's failure to establish any "injury in fact" leads inescapably to the conclusion that AkCLU does not have standing to bring to federal court this challenge to the 1996 campaign laws. Because AkCLU has not shown that it or its members have suffered *any* injury, it also

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[3] AkCLU's evidence in support of its position in state court consisted of the affidavits of four individuals. *See* Aff. J. Lottsfeldt (Apr. 10, June 29, and July 16, 1998); Aff. H. Alexander (Apr. 8, 1998); Aff. T. McKay (July 1, 1998); Aff. G. Jacobson (July 16, 1998). Like AkCLU's complaint, none of these affidavits include any assertion of injury to AkCLU or its members as a result of the 1996 reforms. *Id.*

fails to meet the second of the standing requirements—that the party's injury be causally connected to the challenged action. Similarly, AkCLU cannot satisfy the third requirement for standing, redressability. Because AkCLU has demonstrated no injury, a favorable decision plainly could not redress it.

The State of Alaska did not contest AkCLU's standing to challenge the campaign finance reforms in the Alaska courts. Def.'s Mem. Opp'n Summ. J. 33-35 (Mar. 13, 1998). But that does not affect its challenge in this federal court. *See Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). Standing in the federal courts is jurisdictional and is not subject to waiver. *Id.; United States v. Hays*, 515 U.S. 737, 742 (1995) (" '[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.' " (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990))).

Moreover, the requirements for standing in the Alaska state courts are much less rigorous than the Article III requirements applicable here:

> "Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions." Standing is interpreted broadly in Alaska, and we favor "increased accessibility" to our courts.

Sonneman v. State, 969 P.2d 632, 636 (Alaska 1998) (quoting *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987), *cert. denied*, 486 U.S. 1032 (1988)) (citation omitted). By contrast, Article III standing is, of course, constitutionally required. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998).

In federal courts, analysis of standing includes prudential considerations in addition to the Article III standing requirements. *Phillips Petroleum Co.*, 472 U.S. at 804. These prudential considerations are aspects of the self-restraint of the federal judiciary and the principle of avoiding unnecessary constitutional adjudication. Among these prudential considerations is the limitation that parties normally may assert only their own legal interests rather than those of third parties. *Id.* The Court may relax its prudential considerations in certain First Amendment contexts, but that does not obviate the need to satisfy the constitutionally required standing criteria—which AkCLU cannot do.

Before a court may relax the prudential standing requirements, a party must first satisfy the standing requirements of Article III, including the crucial "injury in fact" requirement. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-55, 958 (1984). Although a party may have standing to assert the rights of the public once a proceeding is properly initiated, the party may not initiate appellate review without demonstrating that it has suffered injury to its own cognizable interests. *Sierra Club*, 405 U.S. at 737 n.12, 740 n.15; *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988). Because AkCLU cannot satisfy this threshold requirement, it cannot raise the First Amendment claims of others.

AkCLU lacks standing to bring this matter before the Court because there is no evidence in the record or allegation in the pleadings that AkCLU or its members have suffered cognizable injuries as a consequence of the 1996 campaign finance reforms. Accordingly, this Court lacks jurisdiction to consider the merits of AkCLU's petition.

II. THE ALASKA SUPREME COURT APPLIED THE STANDARD OF PROOF THAT AkCLU CONTENDS IS CORRECT.

Even if AkCLU had standing to pursue its challenge in this Court, there is no reason to grant certiorari to review the Alaska Supreme Court's evidentiary determination under what AkCLU itself argues is the correct legal standard. The principal question presented by the petition is whether campaign finance laws must be evaluated under the "real problem" standard. Pet. i. But, as AkCLU acknowledges, the Alaska Supreme Court expressly *applied* this "real harm" standard in reviewing the Alaska campaign finance reforms challenged here. Pet. 8 (citing Pet. App. 16a-18a). Thus, the true nature of AkCLU's objection is not that the Alaska Supreme Court failed to apply the correct legal standard; rather, AkCLU objects to the Alaska Supreme Court's assessment of the sufficiency of the evidence to meet this standard. *Id.* at 9-11.

The voluminous record in this case plainly supports the Alaska Supreme Court's determination that the "real harm" standard was met. But misapplication of the law is not, in any event, a sufficient basis for granting a petition for a writ of certiorari. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). AkCLU's challenge to the Alaska Supreme Court's conclusion that the State of Alaska presented sufficient evidence to meet the "real harm" standard does not justify departure from the Court's customary practice.

III. THE COURT'S GRANT OF CERTIORARI IN *NIXON V. SHRINK MO. GOV'T PAC* DOES NOT JUSTIFY HOLDING AkCLU'S PETITION.

Because the Alaska Supreme Court has already carefully reviewed the evidence under the "real harm" standard that AkCLU argues should be applied, there is no reason to hold this case for the outcome of *Nixon v. Shrink Mo. Gov't PAC* (No. 98-963). While AkCLU cites the Court's decision to grant certiorari in *Nixon* as a reason for granting or deferring disposition of its petition (Pet. 7-11, 22), the Court's grant of certiorari in *Nixon* does not affect AkCLU's petition. The Alaska Supreme Court applied the more demanding "real problem" or "real harm" standard that AkCLU advocates and that the panel of the United States Court of Appeals for the Eighth Circuit applied in the decision at issue in *Nixon*. Pet. App. 16a-18a; *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998). *Nixon* concerns whether the Eighth Circuit panel's "real problem" standard is too demanding and whether that standard is consistent with the Court's decision in *Buckley*. Pet. at 10-16, *Nixon v. Shrink Mo. Gov't PAC* (No. 98-963); Brief in Opp'n of Resps. Shrink Missouri Government PAC and Zev David Fredman at 13-18, *Nixon v. Shrink Mo. Gov't PAC* (Nos. 98-963 and 98-978).

Regardless of whether the Court ultimately concludes that the evidentiary standard that the Eighth Circuit panel applied in *Nixon* was too strict, the results of the Alaska Supreme Court's decision will remain unaffected, because the Alaska Supreme Court applied the *more demanding* standard that is the focus of contention in *Nixon*. The 1996 reforms obviously will withstand a less rigorous standard since the Alaska court found them constitutional under the "real harm" or "real problem" standard. Consequently, the Court's grant of certiorari in *Nixon* pro-

vides no basis for granting AkCLU's petition. For the same reason, there is no reason to hold this petition for the outcome in *Nixon*—whether or not this Court embraces the more demanding "real problem" standard, there would be no need to grant the petition in this case and remand for reconsideration in light of *Nixon*.[4]

That the Alaska Supreme Court found sufficient evidence of "real harm" to establish the constitutionality of the 1996 reforms is unsurprising. The court had before it more than 1800 pages of documents supporting the need for the reforms. Pet. App. 5a. The affidavits, independent studies, state senate study, news clippings, Alaska Public Offices Commission reports, and campaign disclosure records that the State submitted were more than sufficient to demonstrate to the Alaska Supreme Court the existence of "real harm" justifying nearly all of the provisions of the 1996 reforms.

The Alaska Supreme Court's decision that the evidence in this case satisfied the "real problem" standard is not inconsistent with the decision of the Eighth Circuit panel in *Nixon*. In *Nixon*, the panel concluded that the particular evidence offered there was insufficient to meet the "real problem" standard. *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d at 522. Furthermore, the only statutory provision at issue in *Nixon* is Missouri's limit on individuals' contributions to candidates for statewide office. Pet. at 2-4, *Nixon v. Shrink Mo. Gov't PAC* (No. 98-963); Brief in Opp'n of Resps. Shrink Missouri Government PAC and Zev David Fredman at 2-4, *Nixon v. Shrink Mo. Gov't PAC* (Nos. 98-963 and 98-978). AkCLU's challenge to Alaska's laws concerns a much wider

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[4] Furthermore, because this Court lacks jurisdiction to grant this petition, the Court would be unable to take any action on the merits in this case in light of *Nixon*. *See ASARCO Inc. v. Kadish*, 490 U.S. at 620-21 & n.1.

variety of campaign finance limits. AkCLU seeks the Court's review of the constitutionality of "an unprecedented array of campaign finance regulations," including limits on individuals' contributions to candidates, contributions to and from political parties, candidates' use of campaign contributions, and nonresidents' contributions. Pet. 11-21. Accordingly, the Court's grant of certiorari in *Nixon* has no bearing on AkCLU's petition.

IV. THE ALASKA SUPREME COURT PROPERLY CONSIDERED AND CORRECTLY APPLIED THIS COURT'S DECISIONS IN *BUCKLEY* AND *COLORADO REPUBLICAN*.

There is no reason to grant certiorari to review the Alaska Supreme Court's application of *Colorado Republican* and *Buckley* because the court considered those decisions and correctly applied them.

A. The Alaska Supreme Court Correctly Concluded that *Colorado Republican* Is Not on Point.

This Court's decision in *Colorado Republican* is not relevant to the issues that were before the Alaska Supreme Court. AkCLU asserts that its petition presents an issue reserved in *Colorado Republican*: whether the Constitution permits limitation of a political party's expenditures in support of an election campaign that the party coordinates with the candidate. 518 U.S. at 613; Pet. 12. AkCLU argues that the 1996 reforms unconstitutionally restrict political parties' contributions because the law "sweeps within its annual contribution restriction coordinated expenditures made in consultation with an affiliated candidate." Pet. 12. However, the 1996 reforms do not address the specific issue of coordinated expenditures, so the issue was not before the Alaska Supreme Court and the court did not address the issue in its decision.

The Alaska Supreme Court rightly distinguished *Colorado Republican*: "because *Colorado Republican* addresses limits on parties' independent expenditures, not contributions, it does not squarely apply. As noted above, the Court has held that expenditure limits infringe much more directly on speech than do contribution limits." Pet. App. 61a. The restriction on political parties that the Alaska Supreme Court reviewed, Alaska Stat. § 15.13.070(d) (Lexis 1998), sets limits on parties' contributions. Another provision, *id.* § 15.13.135, allows political parties to make unlimited "independent" expenditures. The 1996 reforms do not expressly address the subject of parties' coordinated expenditures. Because AkCLU raised only a facial challenge to the law, there were no facts before the Alaska Supreme Court—and are no facts before this Court now—showing that the law would be applied to limit coordinated expenditures. The prudential considerations that led the Court in *Colorado Republican* to address only the issue arising from the facts before it—the constitutionality of a limit on expenditures that were not coordinated with the candidate—apply with equal force here. The Alaska Supreme Court did not consider the issue of coordinated expenditures because the issue was not before it.

AkCLU also argues that the 1996 reform measures restrict contributions *to* a political party more than *Colorado Republican* and *Buckley* permit. Pet. 13. AkCLU's concern is that the reform measures do not expressly permit unlimited contributions to a political party for the purpose of party building—the "soft money" exception recognized in federal campaign law. Neither *Colorado Republican* nor *Buckley*, however, require that a donor to a political party be able to make unlimited contributions that are earmarked for party building rather than for a candidate's election.

B. The Alaska Supreme Court Carefully Considered *Buckley* and Correctly Applied It.

The Alaska Supreme Court also did not, as AkCLU contends, ignore *Buckley* in its 81-page decision. Pet. 15, 16. To the contrary, the Alaska Supreme Court described *Buckley* as "the wellspring of modern campaign finance jurisprudence" and discussed *Buckley* at length before applying the *Buckley* analysis in its review of the constitutionality of Alaska's 1996 reforms. Pet. App. 8a-14a. AkCLU cites the Alaska Supreme Court's approval of the reforms' provision regulating candidates' post-election use of excess campaign contributions as an example of a restriction on campaign expenditures that is contrary to *Buckley*. Pet. 15-16. The Court in *Buckley* did not, however, address similar restrictions. Moreover, the Alaska Supreme Court applied the analysis that the Court described in *Buckley* in reviewing these "spend down" provisions. The Alaska court concluded that these limits burden speech but that the State's interest in preventing the use of funds retained from previous campaigns to circumvent valid contribution limits is compelling and justifies the restrictions. Pet. App. 74a-75a. Likewise, the Alaska Supreme Court did not, as AkCLU contends, ignore *Buckley* in upholding the various contribution limits. Pet. 16-17. It thoughtfully considered and applied the analysis that the Court developed in *Buckley*. Pet. App. 31a-62a. The *Buckley* analysis, as applied to the evidentiary record before the court, directed the court to its conclusion that those limits are constitutional.

V. THE ALASKA SUPREME COURT'S EVIDENTIARY DETERMINATION REGARDING LEGISLATION UNIQUE TO ALASKA DOES NOT PRESENT ISSUES THAT MERIT THIS COURT'S REVIEW.

AkCLU's petition presents no issues of broad or national significance. The petition simply concerns the

Alaska Supreme Court's decision that the State's voluminous evidence of the uniquely Alaskan experience with campaign finance issues warranted the passage of the challenged legislation and justifies that legislation under the onerous "real harm" standard. The Alaska Supreme Court determined that the particular evidence that the State offered concerning Alaska's own campaign finance experience was sufficient under the "real harm" standard to establish a compelling state interest supporting those particular provisions of Alaska law. That evidentiary determination is not a matter of broad national significance.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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IN THE
Supreme Court of the United States

ALASKA CIVIL LIBERTIES UNION,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition is remarkable in its failure to offer any substantive explanation of how the Alaska Supreme Court's decision comports with this Court's decisions, notably *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996). Neither the "vastness," "remoteness," or other purportedly "unique" characteristics of Alaska cited by Respondent, Opp'n 6-7, 22-23, is sufficient to justify the severe restrictions on First Amendment rights at issue in this case. Alaska's citizens have no less right to express their political views or associate with others for political purposes than citizens of the other 49 states. The Alaska Court's decision to uphold an individual contribution limit less than half of that ap-

proved in *Buckley*, to preclude certain non-resident contributions in their entirety, and to impose more stringent contribution and expenditure restrictions on its political parties than on any other group, directly contradicts the constitutional doctrines established in *Buckley* and extended in *Colorado Republican*. Respondent cites no authority of this Court supporting the Alaska Court's decision.

Respondent instead urges the Court to deny review of the Alaska Court's decision contending for the first time in this litigation that Petitioner lacks standing. Specifically, Respondent argues that the AkCLU fails to satisfy the "injury-in-fact" element of the federal standing doctrine as explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and then concludes that this Court is without jurisdiction to entertain the AkCLU's petition for certiorari. Opp'n 12-13, 16.

Respondent's conclusory assertions that the AkCLU lacks standing are overstated and erroneous. Respondent relies exclusively on the "direct standing" test of *Lujan*, and fails even to identify the more applicable "associational standing" doctrine set out in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and recently applied by this Court in *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996). The AkCLU submits that the donative records set out in or summarized by the 1,800-page record so-often cited by Respondent establish that the 1996 campaign finance restrictions cause concrete injury to the AkCLU and its constituent members—a number of whom are candidates for public office who receive affected contributions; others of whom make contributions to candidates and groups in ways impaired by the Alaska restrictions. These evidentiary attributes of standing are more than sufficient to meet constitutional

requirements, particularly given the fundamental First Amendment interests restricted by the Alaska statute. "[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech." *Eisenstadt v. Baird*, 405 U.S. 438, 445 n. 5 (1972) (citations omitted). *See Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 956 (1984).

In none of the proceedings below did Respondent raise a claim that Petitioner lacked standing. Typically, such claims are raised as litigation unfolds and both parties present evidence beyond the summary assertions set out in the original complaint. The factual prerequisites to establish standing, in fact, vary at different junctures of a case. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Lujan*, 504 U.S. at 561, *citing Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

Respondent expressly acknowledged standing before the state court. *See* Opp'n 15. Indeed, counsel for the State entered into an agreement with Petitioner's counsel that standing would not be challenged in the proceedings.[1]

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[1] This agreement among counsel is reflected in Respondent's brief before the state superior court: "While the case law might provide some basis for attacking the ACLU's standing to challenge at least some of the reforms, a ruling on standing or ripeness grounds would only serve to delay a decision on these issues of paramount public concern. The State has determined that such delay would not serve the public interest. That interest is better served by a prompt resolution of the questions raised. . . ." Def.'s Mem. Opp'n Summ. J. 34-35 (Mar. 13, 1998).

While Petitioner recognizes that this Court has an independent obligation to determine the standing of litigants before it, Respondent's actions should not be allowed to defeat this Court's review of an important federal constitutional issue.

Respondent's current position has the further—and curious—effect of denying any preclusive effect to the Alaska Supreme Court's decision. *See ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). As the *ASARCO* Court stated, "Although the judgment of a state court on issues of federal law normally binds the parties in any future suit even if that suit is brought separately in federal court, we have occasionally cautioned that such a judgment may well *not* bind the parties if the state court's conclusions about federal law were not subject to any federal review." *Id.* at 621 (emphasis in original).

Accordingly, neither the jurisdictional limitations arising under 28 U.S.C. § 1257 nor principles of res judicata or collateral estoppel apply if federal standing requirements are not satisfied and this Court is prevented from exercising its duty to be the "final arbiter" of the important federal constitutional issues raised in this case. *See Doremus v. Board of Educ. of Hawthorne*, 342 U.S. 429, 434 (1952) (conclusive disposition of an issue of federal law cannot occur in the absence of an opportunity for federal court review); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940) (this Court is responsible for assuring "that state courts will not be the final arbiters of important issues under the federal constitution"). Respondent's assertion that the AkCLU lacks standing to obtain federal review of the Alaska court's decision thus estopps the state from denying any party—including the AkCLU—access to federal court to adjudicate precisely the same issues.

If the Court believes that standing is an issue in this case, it should grant the petition for certiorari and ask the parties for full briefing on the issue, as has been the Court's practice in other similar cases. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 65 (1997); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 540-41 (1985); *Secretary of Navy v. Avrech*, 418 U.S. 676, 677 (1974) (per curiam). Through this procedure the Court will have the benefit of full and fair, adversarial briefing on the matter, rather than the necessarily truncated arguments available in briefs filed in conjunction with the original petition for certiorari.

CONCLUSION

For the reasons stated in the petition and this reply, the petition for writ of certiorari should be granted.

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